No. 99-166-CFY Title: United States, Petitioner
v.
Webster L. Hubbell

Docketed: July 26, 1999 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Jul 26 1999	Petition for writ of certiorari filed. (Response due August 25, 1999)
	Jul 26 1999	Appendix of petitioner filed.
	Aug 12 1999	Waiver of right of respondent Charles C. Owen to respond filed.
	Aug 25 1999	Brief of respondent Webster L. Hubbell in opposition filed.
	Sep 8 1999	Reply brief of petitioner United States filed.
	Sep 8 1999	DISTRIBUTED. September 27, 1999
	Oct 4 1999	REDISTRIBUTED. October 8, 1999
	Oct 12 1999	Petition GRANTED. SET FOR ARGUMENT February 22, 2000. **********
	Nov 24 1999	Joint appendix filed.
	Nov 24 1999	Brief of petitioner United States filed.
	Nov 30 1999	Brief amicus curiae of Department of Justice filed.
	Dec 7 1999	Motion of United States Department of Justice for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 10 1999	Record filed.
	Dec 13 1999	Record filed.
	Dec 27 1999	Brief of respondent filed.
	Dec 27 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jan 7 2000	CIRCULATED.
	Jan 18 2000	Motion of United States Department of Justice for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 18 2000	Reply brief of petitioner United States filed.
	Feb 22 2000	ARGUED.

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No. ——

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's privilege against self-incrimination protects information previously recorded in voluntarily created documents that a defendant delivers to the government pursuant to an immunized act of production.

2. Whether a defendant's act of producing ordinary business records constitutes a compelled testimonial communication solely because the government cannot identify the documents with reasonable particularity before they are produced.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Mr. Hubbell is respondent in these proceedings. In addition, Suzanna W. Hubbell, Michael C. Schaufele, and Charles C. Owen were parties to the proceedings in the district court and the court of appeals. We believe, however, that they are not affected by the issues raised in the petition and have no interest in its outcome. Sup. Ct. R. 12.4. First, those issues relate only to Mr. Hubbell's act of production. Second, and more definitively, all charges against those three individuals were dismissed on June 30, 1999, after the decision of the court of appeals below. We have, nonetheless, served counsel for those individuals with a copy of this petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	21
APPENDIX A	
Opinion of the United States Court of Appeals for the District of Columbia Circuit (Jan. 26, 1999)	1a
APPENDIX B	
Opinion of the United States District Court for the District of Columbia (July 1, 1998)	113a
APPENDIX C	
Order of the United States Court of Appeals for the District of Columbia Circuit, denying petition for rehearing (May 4, 1999)	141a
APPENDIX D	
Order of the United States Court of Appeals for the District of Columbia Circuit, denying suggestion for rehearing en banc (May 4, 1999)	142a

TABLE OF AUTHORITIES

Cases — Page

Fisher v. United States, 425 U.S. 391 (1976) ..... *passim*
In re Grand Jury Proceedings on Feb. 4, 1982 (United States v. Terry), 759 F.2d 1418 (1985) .. 15
In re Proceedings Before the Aug. 6, 1984 Grand Jury (United States v. Doe), 767 F.2d 39 (1985) 15
Kastigar v. United States, 406 U.S. 441 (1972) 8
Schmerber v. California, 384 U.S. 757 (1966) 8, 11, 12
Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983) 18
United States v. Doe, 465 US. 605 (1984) ..... *passim*
United States v. Fishman, 726 F.2d 125 (4th Cir. 1983) 16, 18-19
United States v. Municipal Bond & Collection Servs., Inc., 810 F.2d 46 (3d Cir. 1987) 14-15
United States v. Neely, No. 94-5107, 1996 WL 60329 (4th Cir. Feb. 13, 1996) 13-14

Constitutional Provisions, Statutes and Rules

U.S. CONST. amend V ..... *passim*
18 U.S.C. § 6002 ..... *passim*
18 U.S.C. § 6003 3
28 U.S.C. § 594(a) (9) 1
28 U.S.C. § 1254(1) 2
Sup. Ct. R. 12.4 ii

Miscellaneous

Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986) 7

IN THE

Supreme Court of the United States

No. ———

UNITED STATES OF AMERICA,
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v.
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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

The United States of America, by Kenneth W. Starr, Independent Counsel, *see* 28 U.S.C. § 594(a)(9), respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-112a) is reported at 167 F.3d 552. The opinion of the district court (Pet. App. 113a-140a) is reported at 11 F. Supp. 2d 25.

JURISDICTION

The judgment of the court of appeals was issued on January 26, 1999. Pet. App. 1a. The court denied a timely petition for rehearing and suggestion for rehearing

en banc on May 4, 1999. Pet. App. 141a-143a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall be * * * compelled in any criminal case to be a witness against himself."

18 U.S.C. § 6002 provides in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> a court or grand jury of the United States,
>
> * * *
>
> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

On April 30, 1998, a federal grand jury in the District of Columbia returned a ten-count indictment charging respondent Webster L. Hubbell ("Hubbell") and others with a variety of tax-related offenses. C.A. App. JA015-JA056. On July 1, 1998, the district court dismissed the indictment (as to all defendants) as beyond the jurisdiction of the Office of Independent Counsel and also (as to Hubbell alone) as a violation of his Fifth Amendment privilege against compelled self-incrimination. Pet. App. 113a-140a. On January 26, 1999, a panel of the court of appeals reversed both of those holdings and remanded the case to the district court for proceedings on the indictment. Pet. App. 1a-112a.

Because the legal standard that the court of appeals articulated on the self-incrimination question made it infeasible for the government to bring Hubbell to trial, the government filed a petition for rehearing and a suggestion for rehearing en banc. The court of appeals denied the petition and the suggestion, with four judges dissenting from denial of the suggestion. Pet. App. 141a-143a.

More recently, on June 30, 1999, Hubbell entered a conditional guilty plea to a superseding information concerning the conduct described in the indictment. That guilty plea is conditioned on the success of the government in obtaining review by this Court of the standard articulated by the court of appeals. As part of the plea agreement, the government has agreed to move to vacate Hubbell's conviction and sentence if this Court's decision does not materially alter the standard articulated by the court of appeals so that Hubbell's act of production immunity no longer poses a significant bar to his prosecution.

1. The questions presented by this petition arise from a subpoena issued to Hubbell in 1996 by a federal grand jury in the Eastern District of Arkansas. The subpoena sought production of a variety of specified business and income records. When Hubbell declined to comply voluntarily, the United States obtained an order compelling production under 18 U.S.C. §§ 6002, 6003. A few days after the district court issued the appropriate order, Hub-

bell appeared before the grand jury, produced a number of documents, and testified that the produced materials were the result of a complete search for documents responsive to the subpoena. Pet. App. 25a-26a.

The United States used the information contained in those documents, together with a variety of other investigative sources, to develop the various tax-related charges alleged in the indictment. Because all of the charges can be substantiated without the use of the documents produced by Hubbell, the government would have had no need to use the documents themselves at trial, although it did make substantial use of their contents in the investigation that led to the indictment. *See* Pet. App. 29a, 67a n.37.

2. The district court granted Hubbell's motion to dismiss the indictment on the ground that it violated his Fifth Amendment privilege. Pet. App. 128a-137a. The district court acknowledged the firmly established rule "that the contents of voluntarily prepared documents are never protected by the Fifth Amendment privilege" (Pet. App. 131a), but ruled nonetheless that the government could not, constitutionally, use the *contents* of the documents Hubbell produced. The court rested that ruling on its view that Hubbell's production of the documents constituted an implicit testimonial assertion of the existence of the documents. Pet. App. 133a-135a.

The district court did not dispute the government's assertion that it already knew that Hubbell maintained records of the types subpoenaed. Nor did the trial court indicate any respect in which it was incriminating for Hubbell to admit through his act of production that the documents existed. Still, the court held, the contents of the documents were protected by the Fifth Amendment privilege unless the government could establish that it

already was aware of "the existence of the information contained in the documents." Pet. App. 137a n.15.

3. The United States appealed, and the Department of Justice appeared as *amicus* urging reversal of the district court's decision on the Fifth Amendment issue. The court of appeals unanimously rejected the district court's holding that the government could not use the contents of the documents unless it could establish that it already was aware of the contents of the documents. Pet. App. 36a n.23.[1] But the panel divided on the question of exactly what the government must establish to permit its use of the contents of the documents.

a. The majority of the panel (speaking through a per curiam opinion authored, on the Fifth Amendment issues, by Judge Wald, Pet. App. 1a n.*) first considered whether the production of the documents was sufficiently testimonial to constitute a compelled testimonial communication. Pet. App. 36a-65a. On that point, the court rejected the government's argument that production was not testimonial because the existence of the documents was a foregone conclusion. *Compare Fisher v. United States*, 425 U.S. 391, 411 (1976) (explaining that the production of documents is not a testimonial admission if their existence is a "foregone conclusion"). The panel ultimately concluded that the existence of documents is not a foregone conclusion for purposes of the Fifth Amendment unless the government can "demonstrat[e] with reasonable particularity a prior awareness that the * * * documents sought in the subpoena existed and were in [the defendant]'s possession." Pet. App. 62a.

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[1] The court of appeals also reversed the district court on the jurisdictional issue. No party sought further review of that question in the court of appeals.

The court also rejected the government's argument that production of the documents was not incriminating because it constituted nothing more than an implicit admission that the defendant possessed several classes of customary business records. Building on its analysis of the foregone-conclusion question, the court determined that the act of production would be incriminating if the existence of the produced documents was not a foregone conclusion or if the act of production would authenticate those documents. Pet. App. 62a-65a.

Having concluded that the act of production in this case involved incriminating testimonial communications, the court finally turned to the larger question—the extent to which incriminating communications implicit in the act of production taint the theretofore unprivileged contents of the produced documents. Pet. App. 65a-72a. On that question, the court broadly held that *implicit* testimony that documents exist necessarily taints the contents of the documents, even in cases (like this one) in which the existence of the documents themselves (as distinguished from the information that they contained) was entirely irrelevant to the investigation and would be entirely irrelevant to any trial of the charges contained in the indictment. The court explained that, in its view, a contrary holding "essentially eviscerates the act of production doctrine." Pet. App. 68a.

b. Judge Williams dissented from the court's analysis of the Fifth Amendment questions. Pet. App. 100a-112a. In his view, this Court's decision in *Fisher* compelled the conclusion that the existence of the documents was a foregone conclusion, because "these papers' own physical presence [wa]s 'self-evident' at the time and place of production and so long thereafter as the government maintains proper custody." Pet. App. 105a. As he explained,

"[t]he particular documents' existence speaks for itself once they have been delivered." Pet. App. 106a.

Judge Williams also disputed the majority's conclusion that the testimonial aspects of the act of production tainted the contents of the documents. On that question, he expressly adopted the position advanced by the Department of Justice and by Judge Samuel Alito (writing extrajudicially)—that the contents of voluntarily prepared documents were not tainted by the act of production. Judge Williams explained: "[T]he act of production doctrine shields the witness from the use of any information (resulting from his subpoena response) beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven." Pet. App. 111a (citing DOJ Amicus Br. at 42; Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 59-60 (1986)).

4. Inasmuch as the panel majority's articulated standard made it infeasible to bring Hubbell to trial, and in view of the practical and legal significance of the majority's judgment, the United States filed a petition for rehearing and a suggestion for rehearing en banc. The court of appeals *sua sponte* called for the views of the Department of Justice, which filed an *amicus* brief detailing the practical difficulties that would attend the widespread adoption of the majority's viewpoint. The court of appeals nonetheless denied the petition for rehearing, with Judge Williams dissenting. Pet. App. 141a. With two judges recused, the nine member court denied the suggestion for rehearing en banc over the dissent of four judges. Pet. App. 142a-143a.

5. On June 30, 1999, after the mandate issued from the court of appeals, Hubbell entered a conditional guilty

plea to a superseding information covering conduct related to the indictment in this case. That plea is expressly conditioned on the government's success in further litigation with respect to the Fifth Amendment questions. Accordingly, the government has agreed that it will move to vacate Hubbell's conviction and sentence if this Court's decision on the Fifth Amendment questions does not adopt a standard under which Hubbell's act of production immunity no longer poses a significant bar to his prosecution.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision raises two intertwined questions with respect to the Fifth Amendment privilege against self-incrimination in cases in which the United States coerces the production of documents from recalcitrant witnesses under 18 U.S.C. § 6002. Both questions arise out of the tension between two important strands of this Court's Fifth Amendment jurisprudence. On the one hand, the Court in *Fisher* and in *United States v. Doe*, 465 U.S. 605, 611 (1984), articulated an understanding of the narrow scope of the Fifth Amendment privilege, categorically excluding from the privilege's ambit the contents of voluntarily recorded documents. Building on the analysis of *Schmerber v. California*, 384 U.S. 757 (1966), *Fisher* and *Doe* reason that the government's use of the *contents* of voluntarily recorded documents does not implicate the Fifth Amendment because the government has not compelled the exercise of the mental faculties that resulted in the creation of the documents. On the other hand, the Court in *Kastigar v. United States*, 406 U.S. 441 (1972), interpreted Section 6002 and the Fifth Amendment as barring any derivative use by a prosecutor of information delivered under compulsion of that Section: information derived from a compelled act of production is "fruit of the poisonous tree," as it were.

To put a complex matter simply, our view is that the important rights articulated in *Kastigar* are not implicated by the government's use of the *contents* of voluntarily recorded documents. The Fifth Amendment is implicated only if the government uses some compelled testimonial aspect of the act of production, that is, some aspect of the act of production *other than* the voluntarily recorded contents themselves. If the government does not so use any such aspect of the act of production, then the contents should not be viewed as "information directly or indirectly derived from" the act of production.

On both of the questions presented, the court of appeals generally took the opposite view. In effect, the panel majority interpreted *Fisher* and *Doe* narrowly and gave a broad sweep to *Kastigar*. On the majority's view, the "taint" of the act of production can infect the contents of documents otherwise categorically outside the scope of the Fifth Amendment privilege's protection. As the Attorney General explained to the court of appeals, that ruling has great practical significance, especially in the area of white-collar crime prosecutions. Review by this Court is necessary to bring clarity to this important and complex area of criminal procedure.

1. a. The first and broad question is whether a compelled testimonial communication implicit in the act of production taints the otherwise unprivileged, pre-existing contents of the produced documents. The question arises whenever the government makes investigative use of the contents of documents compelled under 18 U.S.C. § 6002, but does not need to prove the defendant's possession of the documents or the existence or the authenticity of the produced documents. The question is presented in its purest form whenever, as in this case, the government can prove the offenses alleged in the indictment without the

need even to introduce the documents produced by the defendant into evidence.

The court below resolved this question in a categorical fashion. The panel majority concluded that the compelled act of production taints the contents in any case in which the act of production includes any implicit testimonial admissions protected by the Fifth Amendment. *See* Pet. App. 71a ("If the [act of production implicates the Fifth Amendment], *Kastigar* forbids the derivative use of the information contained therein against the immunized party."); *id.* at 56a-57a n.33 ("[The government's] a posteriori knowledge [of the contents of documents] is inextricably linked to the communicative testimony inherent in the subpoena response.").

That holding gives no weight to this Court's repeated and emphatic statements that the Fifth Amendment privilege does not extend to the contents of voluntarily created documents. Because the statements contained in such documents exist prior to the exercise of compulsion, the statements necessarily were recorded independently of any relevant governmental compulsion. *See Doe,* 465 U.S. at 611 ("[Because] the preparation of all of the papers sought in these cases was wholly voluntary, * * * they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else."). Thus, there is no legally relevant causal link connecting the creation of the pre-existing statements and the compelled act by which they are produced to the government. Hence, it makes no sense to characterize those pre-existing statements as somehow "derived" from the testimonial admissions implicit in the subsequent act of production. The temporal order of the acts—creation first and then compelled production—renders any such link illusory.

The logical error infecting the decision of the court of appeals is that it collapses the non-testimonial and essentially physical act of production into the incidental testimonial admissions that sometimes are implicit in the act of production. Thus, the court of appeals views document production as a primarily testimonial matter, with some incidental unprivileged physical activity occurring on the side. *See, e.g.,* Pet. App. 50a n.31 ("[The act of producing documents] provides testimony *rather than* physical or real evidence.") (emphasis added). Indeed, the dispositive portion of the opinion (section II(B)(1)(d), Pet. App. at 65a-72a) ignores the rule that the Fifth Amendment does not protect the contents of documents.

It is more sensible to recognize that the government's possession of the documents is attributable solely to the non-testimonial act of production itself. Because production, simpliciter, is a physical act, the Self-Incrimination Clause does not regulate it in any way. *See Schmerber,* 384 U.S. at 764; Pet. App. 101a (Williams, J., dissenting) ("Where an item of information that a prosecutor receives from a document delivery flows from a non-testimonial aspect, he does not depend on any testimonial aspect [of the document delivery]."). At bottom, the privilege protects only information that is "derived from" the compelled testimonial communications implicit in the act of production. Contrary to the court of appeals's holding, it is not enough to show that information is the fruit of the physical act generally. It must be shown to be the fruit of some compelled testimonial communication. That is manifestly not the case here.

The illogical implications of the D.C. Circuit's rule are perhaps clearest in the pivotal concluding portion of its analysis. There, the majority defends its interpretation of the Fifth Amendment by describing this as a case in which "the testimonial value of document production is high,

and the government obtains a large quantum of information directly from the witness' mental faculties." Pet. App. 70a-71a. With all respect, that analysis is entirely wrong. The act of production in this case has absolutely no testimonial value—to prove the tax charges in the indictment, the government would not have needed to establish that *any* of the documents existed or were authentic, let alone that the defendant was in possession of them or produced them to the government—and the government obtained *no* useful information from compelled exercise of the witness's mental faculties. *Compare Schmerber*, 384 U.S. at 762 (explaining that, whatever the policies of the privilege might suggest in the abstract, the constitutional privilege always has forbidden only "the cruel, simple expedient of compelling [evidence] from [the defendant's] own mouth"). All of the useful information that the government obtained came from the *voluntary creation* of the documents. The relevant exercise of Hubbell's mental faculties occurred at the time the documents were created, long before the subpoena was served. Because none of the information was "derived from" Hubbell's compelled communications, all of the information should be available to the government's investigation and prosecution of Hubbell.

Nor is it any more persuasive for the court of appeals to state that our position "essentially eviscerates the act of production doctrine." Pet. App. 68a. For one thing, the court's formulation begs the question presented, namely the breadth of the doctrine: our position cannot eviscerate the doctrine unless we are incorrect in our understanding of the doctrine.[2] And on that point, our position is entirely consistent with this Court's decisions. It assuredly does *not* remove the force from this Court's discussion in *Fisher* and *Doe* of the possibly privileged fruits of an act of production. For example, consider a case in which the prosecution needs to show that the defendant was aware of the contents of a particular document that the defendant had produced under compulsion. The defendant's possession of the document at the time of the subpoena might be highly probative of the defendant's guilt. Nonetheless, in our view the prosecution could not prove that possession by relying on the defendant's compelled act of producing the document. But in a case (like this one) in which the government has no need to use any such implicit testimonial communications, it makes no sense—in causation, in logic, or in law—to conclude that the statements voluntarily recorded before the initiation of compulsion are "derived from" some testimonial communication that might be implicit in the act of production and not from the unprotected act of production itself.

[2] For the same reason, the language of the statute affords no independent support to respondent. If the contents themselves are obtained by the government free of the taint of the compelled testimonial aspects of the act of production, then information derived from use of the contents cannot be "derived from" the compelled production. The question, of course, is whether the voluntarily recorded contents can ever be tainted by the simple, physical act of compelled production that delivers the documents to the government.

b. Not surprisingly, the court's decision conflicts with all of the decisions of the other courts of appeals that have considered similar questions. Indeed, although the courts of appeals have experienced difficulty in applying a number of aspects of the act-of-production doctrine, the courts have treated the question presented here as an easy one. Thus, the lower courts have responded dismissively to arguments such as the one embraced by the court of appeals, based on the view that *Fisher* and *Doe* make the point quite clear. For example, in *United States v. Neely*, No. 94-5107, 1996 WL 60329 (4th Cir. Feb. 13, 1996)

(unpublished) (per curiam), the Fourth Circuit considered an appeal from a district court decision that permitted the government's investigative use of documents produced pursuant to compulsion under Section 6002. *See id.* at *8. The court of appeals readily agreed with the district court that the defendant "possessed no Fifth Amendment right with respect to the contents of th[e voluntarily created] documents." *Id.* at *9. As the court of appeals explained, "although the Government was barred from using Neely's act of producing [the documents] against him, it was free to use the contents of [the documents] against Neely." *Id.* at *9.[3] A similar ruling in this case would have left the government free to proceed against Hubbell.

The courts of appeals frequently have considered the same problem in cases in which defendants have resisted subpoenas on the ground that the subpoenas would force them to deliver protected information contained in the documents. In each of those cases, the courts have rejected the defendant's claim, reasoning that *Fisher* and *Doe* compel the conclusion that the contents would not gain any protection from their delivery in a compelled act of production. For example, in *United States v. Municipal Bond & Collection Servs., Inc.*, 810 F.2d 46 (3d Cir. 1987), the IRS issued a summons seeking business records from a small corporation. The president of the corporation resisted the subpoena, arguing that he would incriminate himself if he produced the documents in question.

[3] *Neely*'s unpublished status does not undermine its precedential value in the Fourth Circuit. *See* 4th Cir. R. 36(c) ("If counsel believes * * * that an unpublished disposition of any court has precedential value in relation to a material issue and that there is no published opinion that would serve as well, such disposition may be cited."). Rather, it suggests only that the Fourth Circuit found our position to be so obviously correct that publication was not necessary for elucidation of the law.

The district court granted immunity that barred the government from using the act of production as evidence against the individual president. *See id.* at 47-48. The president appealed, arguing that the district court also should have barred use of the documents themselves. The Third Circuit firmly rejected that argument, viewing "[t]he contention that the court should have granted 'derivative immunity' [a]s simply an effort to extend immunity to the contents of the records" and concluding that "[t]he argument has no merit." *Id.* at 49.

Similar holdings on that question have come from the Second and Ninth Circuits. Thus, the Second Circuit in *In re Proceedings Before the Aug. 6, 1984 Grand Jury (United States v. Doe)*, 767 F.2d 39 (1985) (per curiam), refused to quash a subpoena for a tape recording, explaining that "[t]he act of producing business records may * * * have a testimonial character and fall within the fifth amendment's coverage, but the contents of voluntarily prepared business records are not privileged unless the subpoenaed individual is compelled to 'restate, repeat, or affirm' the contents' truth." *Id.* at 41 (quoting *Fisher*, 425 U.S. at 409). Similarly, the Ninth Circuit in *In re Grand Jury Proceedings on Feb. 4, 1982 (United States v. Terry)*, 759 F.2d 1418 (1985), affirmed a district court's order compelling production of documents. That court explained that *Doe* "has now made it clear that regardless of the precise characterization of the disputed papers, the contents of such documents are not privileged under the fifth amendment in the absence of some showing that creation of the documents was the product of compulsion." *Id.* at 1419. On the case before it, the Ninth Circuit's reasoning was simple: "Terry does not contend that he created the requested documents under any compulsion. Therefore, the contents of the documents are not privileged." *Id.* at 1420.

Under these decisions, the government would be permitted to use evidence derived from the contents of the preexisting, voluntarily recorded documents that Hubbell delivered to the government under compulsion. Because the court of appeals's decision prohibits that course of action, it conflicts with those decisions.

2. The court of appeals would not have reached the first question if it had not launched its analysis with an improperly crabbed application of the foregone-conclusion doctrine articulated in *Fisher*. The majority's construction of the law misreads *Fisher* and conflicts with the Fourth Circuit's decision in *United States v. Fishman*, 726 F.2d 125 (4th Cir. 1983).

a. The conflict with *Fisher* goes to the heart of the D.C. Circuit's decision. The reasonable particularity standard adopted by the court of appeals, Pet. App. 62a, drains the forgone-conclusion doctrine of all force. For all practical purposes, the identity of a document is determined by its contents. Only by its contents—what it says, not its shape, size, or texture—may a document be described with any particularity, for it is those contents that give the document significance. Thus, a standard requiring identification of a document with reasonable particularity is, in effect, a standard that demands a particularized knowledge of the contents of the documents.

Hence, in practice the court of appeals has done in a more intricate way the same thing for which it criticized the district court: the decision essentially requires advance knowledge of the contents of a document as a prerequisite of a right to use the document's contents. That is a daunting standard that no prosecutor is ever likely to meet, and one that effectively would have precluded Hubbell's prosecution here. We draw little comfort from the view of the court of appeals that, "[t]o the extent

that any assessment of the government's knowledge requires something in the nature of a 'metaphysical classification,' * * * the district courts are up to the task." Pet. App. 59a n.34.

To reach this result, it was necessary for the court of appeals to mischaracterize *Fisher* as a case in which the government "had highly specific knowledge as to the existence * * * as well as the location" of the documents. Pet. App. 33a. But the subpoena in that case, much like the subpoena here, called generally for accountant's workpapers, retained copies of income tax records, and correspondence, all for specified individuals and years. *See Fisher*, 425 U.S. at 394. And the *Fisher* Court's explanation of its decision includes not a word of any specific knowledge the government might have had about those papers, a remarkable situation if (as the majority held here) the decision turned on the government's possession of particularized knowledge of the subpoenaed documents. *See Fisher*, 425 U.S. at 411 ("The papers * * * are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the 'truth-telling' of the taxpayer to prove the existence of or his access to the documents."). Indeed, only Justice Brennan (who chose not to join the Court's opinion) seems to have thought that the government's knowledge was relevant. *See* Pet. App. 37a (citing government's knowledge of documents as reported in Justice Brennan's opinion).

The court of appeals also suggests that its narrow reading of *Fisher* is justified by a retreat from *Fisher* in *Doe*. Pet. App. 34a-35a & 37a-39a n.24. The *Doe* opinion cannot bear the reading that the court of appeals attributes to it. The Court in *Doe* briefly mentioned the lower-court finding that the production there implicated the Fifth

Amendment, noted that the finding "essentially rest[ed] on [the lower court's] determination of factual issues," 465 U.S. at 613-14, and then moved on to address the questions on which it had granted review. Nothing in that passage—which refers directly to the passage in *Fisher* that we discuss above—suggests any intention to disavow or distinguish *Fisher*. *See* Pet. App. 105a-106a (Williams, J., dissenting); *see also Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("Needless to say, only this Court may overrule one of its precedents. Until that occurs, [each of our prior cases] is law * * *.").

b. The reasonable-particularity standard also conflicts with the Fourth Circuit's decision in *Fishman*. In that case, a federal grand jury issued a subpoena for patient medical records for a specified period. *See* 726 F.2d at 126 n.1 (quoting the operative language of the subpoena). The doctor refused to comply, was held in contempt, and appealed. The Fourth Circuit affirmed, stating: "Being business records of Dr. Fishman, their existence in the circumstances of this particular case and his possession or control are self-evident truths, and hardly need to be proven through resort by the Government to the act by the owner in turning them over." *Id.* at 127. The Fourth Circuit's decision did not assume any particularized knowledge of the documents; indeed, the court expressly rejected the government's argument that it had advance knowledge of matters beyond the existence of general categories of documents. *Id.* at 127 n.4. Thus, *Fishman* holds that the Fifth Amendment is not implicated by a subpoena for categories of ordinary business records even if the government has no particularized knowledge of the documents that exist within those categories.

The court of appeals rejected that analysis as irrelevant, based on the view that the *Fishman* court was addressing "the question of potential incrimination." Pet. App. 40a. But it is no answer to say that the Fourth Circuit's holding would not apply here because *Fishman* can be characterized as arising under a different paragraph of the *Fisher* opinion than the one containing the analysis on which we rely: the fact is, this case would have been decided differently by the Fourth Circuit. Moreover, the *Fishman* court quite directly refers to the foregone-conclusion doctrine, which we raise here, when it states that the existence of the documents was a "self-evident trut[h]." *Compare Fisher*, 425 U.S. at 411 (explaining that the Fifth Amendment does not protect a defendant's implicit testimonial assertion that a handwriting exemplar is his own because that assertion is "self-evident"). The Fourth Circuit's view of the foregone-conclusion doctrine, as applied in *Fishman*, conflicts with the judgment of the court below that the doctrine does not apply here.

3. The abstract, philosophic tone of the court below might suggest—at first glance—that the case involves highly theoretical issues. While that may well be, the decision below also has great practical import for the criminal justice system. That is not the view solely of a temporary, inferior officer of the Executive Branch. That is the view of the Justice Department, which is vouchsafed with assessing the practical consequences of this manifestly noteworthy decision of the D.C. Circuit. To use the words of the Department (from its filing in support of our suggestion for rehearing en banc), the decision "is likely to impose significant burdens on the prosecution of a specific category of criminal investigations." DOJ Reh'g Response 9. As the Department explained, the decision will create a frequent problem in document-heavy

cases involving individuals and other sole proprietors, especially "a tax or health care fraud investigation [in which it may be appropriate to] seek all of the records of a physician who runs his practice as a sole proprietorship." *Id.*

The difficulty is not just that the court has imposed a burden on the government that exceeds what this Court could have contemplated in *Fisher*, but that the vague standard will spawn needless litigation in the federal district courts. For one thing, it seems unlikely that there will be any substantial category of cases in which a prosecutor will be sure that the "reasonable particularity" standard has been satisfied. *See* DOJ Reh'g Response 9 ("[T]he government will rarely be able to predict with 'reasonable particularity' each of the documents it will receive in response to the subpoena."). Thus, a prudent prosecutor contemplating the compulsion of documents will be forced—as a practical matter—to litigate the question at the time of production.

In the common situation in which a document-intensive investigation does not lead to an indictment, litigation over the ramifications of the document production will be a complete waste of the time of the federal courts. Whatever the merits of the question, it cannot be that this Court in *Fisher* and *Doe* thought it had created a standard calling for litigation in every case of compelled document production. Because of its wide practical implications, the contrary reasoning of the D.C. Circuit warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
APPENDIX A:	
Opinion of the United States Court of Appeals for the District of Columbia Circuit (Jan. 26, 1999)	1a
APPENDIX B:	
Opinion of the United States District Court for the District of Columbia (July 1, 1998)	113a
APPENDIX C:	
Order of the United States Court of Appeals for the District of Columbia Circuit, denying petition for rehearing (May 4, 1999)	141a
APPENDIX D:	
Order of the United States Court of Appeals for the District of Columbia Circuit, denying suggestion for rehearing en banc (May 4, 1999)	142a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 21, 1998 Decided January 26, 1999

No. 98-3080

UNITED STATES OF AMERICA,
Appellant

v.

WEBSTER L. HUBBELL, SUZANNA W. HUBBELL,
MICHAEL C. SCHAUFELE AND CHARLES C. OWEN,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 98cr00151-01)

Before: WALD, WILLIAMS and TATEL, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.*

Separate opinion concurring in Part I filed by *Circuit Judge* WALD.

Separate opinion dissenting from Part I filed by *Circuit Judge* TATEL.

---

* Judge Williams wrote Part I; Judge Wald wrote Part II.

Separate opinion dissenting from Part II filed by *Circuit Judge* WILLIAMS.

PER CURIAM: All defendants—Webster L. and Suzanna W. Hubbell, Michael C. Schaufele, and Charles C. Owen —moved in the district court to dismiss an indictment charging tax evasion and related crimes on the ground that the indictment was beyond the prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr. In addition, Webster Hubbell moved for dismissal on the theory that prosecution necessarily would depend on evidence produced under compulsion and used in violation of the Fifth Amendment and the immunity granted him under 18 U.S.C. § 6002. The court granted both motions. 11 F. Supp. 2d 25 (D.D.C. 1998). We reverse both decisions and remand for proceedings consistent with this opinion.

I. JURISDICTION

On August 5, 1994 this court's Special Division for the Purpose of Appointing Independent Counsels ("Special Division"), upon request from the Attorney General, appointed Kenneth W. Starr as Independent Counsel. It gave Independent Counsel Starr jurisdiction to investigate

> whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

as well as

> other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation

and, more specifically,

> any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Special Division also gave the Independent Counsel jurisdiction to seek indictments against and to prosecute

> any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

Finally, apparently summarizing the above grants, the Special Division ordered that the Independent Counsel have

> prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

These grants of authority were under 28 U.S.C. § 593(b)(1), a provision of the Ethics in Government Act, which calls on the Special Division, on application of the Attorney General, to "appoint an appropriate independent counsel and . . . define that independent counsel's prosecutorial jurisdiction." Besides that authority—and authority to expand an independent counsel's jurisdiction on application of the Attorney General, see *id.*; see also *id.* at § 592(c)(2) (directing Attorney General to follow same procedure as to new information—the Act authorizes an independent counsel to ask the Special Division to "refer" to him "matters related to the independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 594(e). As a result of such a request, the Special Division on September 1, 1994 made a referral of matters concerning Webster L. Hubbell's billing and expense practices while a member of the Rose Law Firm. Hubbell pled guilty to two felony counts concerning these matters in October of that year; in the plea agreement, Hubbell promised to cooperate "by providing full, complete, accurate and truthful information" to the Independent Counsel about Madison, Whitewater, and Capital Management (hereinafter collectively "Whitewater").

The Independent Counsel discovered in 1996 that Hubbell apparently had begun to receive substantial payments as consulting fees in 1994. According to the present indictment, these payments included $100,000 from Hong Kong China Limited (controlled by the Riady family through the Lippo Group) and $62,775 from Revlon.[1]

[1] The relationship between these entities and potential targets of the Whitewater investigation should now be familiar. The Riady family knew and supported President Clinton from the 1980s, and contributed large sums to the Democratic National Committee in the 1990s. See generally House Gov't Reform and Oversight Comm., 105th Cong., Campaign Finance Investigation Interim Report Chapter 4, Part A (1998). Secret Service records indicate that James Riady had made several visits to the White House in the days before the payment to Hubbell was made. See *id.* at 14 n.94. As for Revlon, it later accommodated another potential witness in a different litigation involving possible targets of the Whitewater investigation by offering her a job.

Not satisfied that Hubbell had been fully cooperating, the Independent Counsel sought as he says in his brief, "to determine whether a relationship existed between those payments and Mr. Hubbell's testimony with respect to Whitewater and Madison-related matters."

After the investigation had progressed considerably, the Independent Counsel sought another § 594(e) referral from the Special Division. It granted the referral on January 6, 1998, encompassing prosecutorial jurisdiction over:

> (i) whether Webster L. Hubbell or any individual or entity violated any criminal law, including but not limited to criminal tax violations and mail and wire fraud, regarding Mr. Hubbell's income since January 1, 1994, and his tax and other debts to the United States, the State of Arkansas, the District of Columbia, the Rose Law Firm, and others; and
>
> (ii) whether Webster L. Hubbell or any individual or entity violated any criminal law, including but not limited to obstruction of justice, perjury, false statements, and mail and wire fraud, related to payments that Mr. Hubbell has received from various individuals and entities since January 1, 1994.

A federal grand jury indicted Hubbell and the other defendants on April 30, 1998. The indictment alleged conspiracy, mail and wire fraud, and various tax offenses, all concerning attempts to keep Hubbell's income—including, in material part, the consulting fees—from creditors and the IRS.

On July 1, 1998 the district court granted defendants' motion to dismiss the indictment in its entirety as beyond the authority of the Independent Counsel. 11 F. Supp. 2d at 27.

* * *

The threshold issue before us is the effect, if any, of the Special Division's January 6, 1998 referral order ("the referral"). The Independent Counsel argues that the referral is either unreviewable or is entitled to deference from this court; defendants—and the Department of Justice in its amicus brief—argue that it is irrelevant. No one suggests that the indictment is beyond the scope of the referral.

Referrals from the Special Division are authorized by 28 U.S.C. § 594(e), which provides: "An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters." The Supreme Court said in *Morrison v. Olson*, 487 U.S. 654 (1988), that "this provision does not empower the court to expand the original scope of the counsel's jurisdiction . . . [but] simply to refer matters that are 'relate[d] to the independent counsel's prosecutorial jurisdiction' as already defined." *Id.* at 680 n.18.

The referral here, then, is simply an explicit determination by the Special Division that the original grant of jurisdiction implicitly included the matters referred. See *In re Espy*, 80 F.3d 501, 507 (D.C. Cir. 1996); see also *Morrison*, 487 U.S. at 685 n.22. The Independent Counsel argues for unreviewability of this determination by analogy to what he regards as comparable decisions of the Attorney General. For such unreviewable counterparts he points first to the decisions of the Attorney General and

her subordinates to have "Main Justice" prosecute certain cases rather than a local U.S. Attorney's Office and second to the Attorney General's own referral authority under § 594(e). In *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996), the Eighth Circuit found the latter unreviewable, relying in part on the analogy to the Main Justice/U.S. Attorney allocation.

At least as applied to the Special Division, however, the analogy does not hold. Although the Supreme Court upheld the independent counsel provisions of the Ethics in Government Act against constitutional challenge in *Morrison v. Olson*, the Court, in rejecting the attack on the statute's grant of powers to the Special Division, saw it as important to say that the § 594(e) power did not empower the Division to expand the original grant of jurisdiction. 487 U.S. at 680 n.18. If the constitutional balance between the branches requires this constricted reading of § 594(e), it would be startling (though not inconceivable) to find that Article III courts are powerless to enforce the boundary. No such issues are at stake in the parceling out of jurisdiction between Main Justice and the various U.S. Attorneys' offices. And *Tucker* itself poses somewhat different issues, as there the executive branch—the one most jeopardized by the independent counsel provisions—is the one exercising the § 594(e) power. In *Tucker*, moreover, the Eighth Circuit also relied upon particular legislative history indicating that Congress intended the Attorney General's § 594(e) referrals to be unreviewable, see 78 F.3d at 1317-18, history not paralleled as to § 594(e) referrals by the Special Division. We therefore find nothing that overcomes the general presumption of reviewability.

But the independent counsel alternatively asks for deference to the Special Division's § 594(e) referral. We initially observe that it is not clear in what constitutional

capacity the Special Division acts in making a referral. The Independent Counsel and the Department of Justice as amicus see referrals as some sort of agency action; defendants, like the district court, appear to leave open the possibility that the proper analogy is to various other ancillary functions performed by the judiciary—authorizing search warrants, for example.[2] 11 F. Supp. 2d at 30-31. Both analogies seem fairly (though not entirely) apt —as one might expect for a constitutional hybrid—but they lead us to the same result: substantial deference.

Viewed as an agency, the Special Division appears to act quite like one glossing its own regulation—a situation in which we usually grant substantial deference. See *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (deference to agency interpreting its own regulations at least equal to deference under *Chevron*). Defendants and the Department of Justice as amicus would have us reject deference on the ground that the Division operates without procedures for critique and comment by outsiders, especially by adversely affected parties. But the cases frequently find deference in such safeguard-deprived circumstances. See, e.g., *Stinson v. United States*, 508 U.S. 36 (1993) (commentary to sentencing guidelines); *Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 136 F.3d 819 (D.C. Cir. 1998) (interpretation implicit in Commission's decision to bring enforcement action); *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (litigating position, as long as it is agency's actual and deliberated-upon view); *Paralyzed*

[2] Although an argument that the Special Division's interpretation of the original grant's legal language is judicial action and presumptively unreviewable as law of the case could be at least facially plausible, see, e.g., *Espy*, 80 F.3d at 507, no party has taken such a position here.

Veterans, 117 F.3d at 581-82 (supplement to DOJ's ADA Title III Technical Assistance Manual).

The Department of Justice goes on to characterize its chief, the Attorney General, as the entity actually responsible for the initial grant; from that assumption it reasons that Congress likely intended no deference for the Special Division's interpretations of the initial § 593 grant (which is all that § 594(e) referrals are). See *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 158 (1991) (Congress may divide various powers as it wishes, subject to broader constitutional limitations). But the fact that the Attorney General initiates the appointment process and makes an initial suggestion of jurisdiction cannot be a basis for withholding deference to the Special Division: in the end, the order appointing the Independent Counsel and setting out his jurisdiction is articulated and issued by the Special Division as its own action. See 28 U.S.C. § 593(b)(1); *Paralyzed Veterans*, 117 F.3d at 585 (identity of actual regulation-drafter irrelevant once regulation is "put out by [the latter agency] as its own"). We therefore presume that the Special Division's interpretations receive deference, see *Martin*, 499 U.S. at 151 ("[W]e presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."), and we find no intent to overcome that presumption.

Morrison, it is true, requires that "the jurisdiction that the [Special Division] decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case." 487 U.S. at 679. This sets out the constitutional boundary for the Special Division's initial action. Even if we assume its extension to the Division's later § 594(e)

interpretation of that grant, nothing helpful to the Department's or defendants' position would follow. It would be a curious revival of the discredited doctrines of "constitutional fact" and "jurisdictional fact" to infer from the constitutionality of the boundary that an Article III court (as such) must draw it de novo. See John Dickinson, "*Crowell v. Benson*: Judicial Review of Administrative Determinations of Questions of 'Constitutional Fact,'" 80 U. Pa. L. Rev. 1055, 1072-75, 1077-79 (1932) (explaining logical errors in doctrine now generally regarded as moribund);[3] see also *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (*Chevron* deference applicable even to questions of agency jurisdiction and preemption of state power). There is no claim by defendants, moreover, that if the disputed referral is within the original grant, it would follow that the original grant was ipso facto outside the zone within which it was required to fall, i.e., "demonstrably related" to the Attorney General's request.

Defendants stress additional language in *Morrison* that, they claim, characterizes the referral power of the Special Division as "essentially ministerial." 487 U.S. at 681. This simply misreads the case—the language specifically refers to the provisions listed in its footnote 19: referral is not among them.

[3] In Dickinson's analysis the key error is to suppose, of a fact that is said to be a necessary basis of jurisdiction or of constitutionality, (1) that it may be known absolutely and (2) that only judicial apprehension of the fact can constitute that knowledge. See *id.* at 1074. Indeed, as almost any issue could be characterized as a jurisdictional or constitutional one, this sort of reasoning would swallow deference whole. See *id.* at 1077-79; see also *Mississippi Power & Light Co. v. Mississippi* ex rel. *Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) ("To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.").

The existence of alternative referring agencies, the Attorney General and the Special Division, presents further deference problems. Compare, e.g., *Rapaport v. OTS*, 59 F.3d 212, 216-17 (D.C. Cir. 1995) (no deference in *Chevron* context if more than one agency given authority) with *id.* at 220-22 (Rogers, J., concurring in the judgment) (case-by-case determination of deference in such situations). Is a referral by the Attorney General also entitled to deference? We have seen that she would not be interpreting her *own* grant of jurisdiction—the key issue under *Martin*—but we do not rule out other possible grounds for deference or even unreviewability. See, e.g., *Tucker*, 78 F.3d at 1317-19 (legislative history indicates that referrals from Attorney General are not reviewable). Indeed, as *Morrison*'s concern about the Special Division's power is far less applicable to a § 594(e) reference by the Attorney General (who would be voluntarily ceding her own power), her power here may not be limited to interpreting the original grant; any review of her referral would then be in an entirely different context. As either entity may act under § 594(e) only at the initiative of the Independent Counsel,[4] the possibility of conflicting interpretations is one that the Independent Counsel can freely prevent. Further, a grant by one authority and denial by the other need not necessarily constitute a con-

[4] The statute also says that the Attorney General may refer a matter "on the Attorney General's own initiative," but then provides that the Independent Counsel "may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction," 28 U.S.C. § 594(e), so that in this context the independent counsel himself can unilaterally moot the relatedness issue by deciding not to proceed.

We note further that the Attorney General has taken no action under § 594(e) in this case. The Independent Counsel did not ask her for a referral of the contested matters until October 9 of this year—well after the Special Division had already granted its referral—and she has not yet acted.

flict: the phrase "may refer" appears to include some discretion to decline referral even where the authority agrees with the proposed interpretation of the initial jurisdictional grant. Indeed, this apparent discretion suggests the possibility—on which we express no opinion—that Congress intended only a *grant* of referral to be authoritative.

Finally, the claim of zero deference would if accepted render § 594(e)'s provision for referral by the Special Division meaningless. We do not believe Congress enacted this statutory procedure simply to relieve the solitude of the Independent Counsel's office.

The search warrant analogy—brought to mind by the defendants' and the Department's stress on the absence of adversary procedures—is also instructive. Although made ex parte and resolving constitutional questions, a determination of probable cause by a federal magistrate or state judge is given "great deference." *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (internal quotation omitted). And in this context it is quite plain that neither the allocation of the power to an array of entities nor the possibility of denial by one judge before a grant by another stands in the way of deference to any particular warrant actually granted.

Both analyses lead us to deference, but employ different linquistic formulations. An agency's interpretation of its own regulation is upheld unless "plainly erroneous or inconsistent" with the regulation, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), while a search warrant is valid if the magistrate had a "substantial basis" for his finding of conformity to the applicable standard (probable cause). *Gates*, 462 U.S. at 238. Such formulations do not necessarily conflict: each appears to assume a paradigm case rather different from the Special Division's § 594(e) referral.

Although deference to an agency's interpretation of its regulations applies where it is simply applying the regulation to a specific set of facts, see e.g., *Consolidation Coal Co.*, 136 F.3d at 820-21, the deference is plainly focused on the agency's norm-defining role.

It makes sense to view the referral power thus, at least in part. Unlike a magistrate issuing a warrant, for example, the Special Division is not interpreting a single concept with an elaborate precedential pedigree and fairly well-established outline: even key terms (such as "related to") are, as terms of art go, still novel and quite ambiguous. Further, just it is far easier for an agency to develop and maintain a coherent interpretitive line if its legal interpretations enjoy deference from the scattered multitude of judges who review its decisions, see Peter L. Strauss, "One Hundred Fifty Cases Per Year," 87 Colum. L. Rev. 1093 (1987) (arguing that this value supports the principle of *Chevron* deference to agency interpretation of statutes), so deference may enable the Special Division to do so, as the thousands of magistrates and state judges who issue warrants obviously cannot.

On the other hand, to the extent these recurring concepts are fleshed out, the grant of referral also entails some of the marshaling and application of facts (or factual assertions) that "substantial basis'" seems to assume and "plainly incorrect or inconsistent" may overlook. In fact, this element and the norm-defining element discussed above appear inextricably entwined in the Special Division's referral decision.

We could perhaps attempt to articulate some multiheaded standard to govern review of the referral. But this would be a futile exercise of judicial ingenuity. As Judge Posner has noted, there is deference and non-deference, but further multiplication of flavors "reflects the lawyer's

exaggerated faith in the Word." *United States v. McKinney*, 919 F.2d 405, 422 (7th Cir. 1990) (Posner, J., concurring); see also *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 753 (2d Cir. 1950) (L. Hand, C.J.), *vacated*, 340 U.S. 474 (1951). That is to say, we believe that a § 594(e) referral from the Special Division falls into the "deference" category. The common thread of deference formulations being reasonableness, see *McKinney*, 919 F.2d at 423,[5] we believe that the Special Division's decision to refer must be upheld if reasonable and rejected if not.

* * *

The statute sets a minimum on the scope of the jurisdiction the Special Division is to grant. We do not think the Special Division's referral is unreasonable even if compared to this minimum. Indeed, we find the indictments themselves within the statutory minimum jurisdiction even without deference to the referral.

The statute begins by directing the Special Division to "assure that the independent counsel has adequate authority to fully investigate and prosecute *the subject matter* with respect to which the Attorney General has requested the appointment of the independent counsel, and *all matters related to that subject matter*." 28 U.S.C. § 593(b)(3) (emphasis added). As we shall see, there is an ambiguity in the definition of that core "subject

[5] More specifically, we have said that "we much doubt that we would defer to an *unreasonable* agency interpretation of an ambiguous regulation." *Paralyzed Veterans*, 117 F.3d at 584 (emphasis in original). Further, although "substantial basis" has not received much specific elaboration, the Supreme Court also formulated the test as "substantial evidence," *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984), which of course simply refers us to the position of a "reasonable factfinder," *Allentown Mack Sales and Service v. NLRB*, 118 S. Ct. 818, 828 (1998).

matter," but, under the sentence as a whole, the Independent Counsel may prosecute anything "related to" it.

The statute continues:

> Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes . . . that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

Id. The Independent Counsel may therefore also prosecute crimes that "arise out of the investigation or prosecution of" the core "subject matter."

As we noted, there is an ambiguity in just what the *core* jurisdiction is. The Attorney General's initial application to the Special Division described the subject matter of the appointment as "whether any violations of federal criminal law were committed by James B. McDougal or any other individual or entity *relating to* Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." Application for the Appointment of Independent Counsel (1994) (emphasis added). It appears unusual in defining the original "core" as criminal activity "relating to" the narrowly conceived subject—Whitewater.[6] One could

[6] Both the former Special Prosecutor's core jurisdiction and the Attorney General's suggested core jurisdiction for the Independent Counsel—which the Special Division adopted as the first jurisdictional clause of its original grant—tracked this expansive version of "subject matter." See Application for the Appointment of Independent Counsel, (Suggested) Statement of Jurisdiction of Independent Counsel ("whether any individuals or entities have committed a violation of any federal criminal law . . . *relating in any way* to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with" Whitewater) (emphasis added).

argue that the "related to" phrases compound: the Independent Counsel would thus be entitled to investigate and prosecute crimes "related to" any crimes "relating to" Whitewater (or, under the second statutory sentence, "aris[ing] out of the investigation" of crimes "relating to" Whitewater).

We think in fact such pilling on adds little. "Relating to" and "arise out of" are themselves such amorphous phrases as to make their addition (or multiplication) virtually meaningless.

Rather we think the minimum statutory space must be read, as we have said in the past, in accord with the purposes of the statute. Its "central purpose . . . is to permit the *effective* investigation and prosecution of high level government and campaign officials." *United States v. Wilson*, 26 F.3d 142, 148 (D.C. Cir. 1994) (emphasis added). Discussing the "related to" language of § 593 (b)(3), we noted that "the scope of a special prosecutor's investigatory jurisdiction can be both wide in perimeter and fuzzy at the borders." *Id.* The word "relation" thus comprises more than identical twins. And just as a person is "related" not only to his parents and children, but to grandchildren and grandparents,[7] the fact that a crime is in some sense a verbal step or two away from the core crime cannot render it *un*related.

More concretely, the jurisdiction to look into matters "related to" the core areas of initial inquiry must allow the Independent Counsel enough leeway to investigate and prosecute such matters as are appropriate for him to effectively carry out his mandate. We think such effectiveness cannot be secured unless the Independent Coun-

[7] We do not, however, express an opinion on the applicability of this metaphor beyond the second generation.

sel is at least able to pursue crimes ancillary to the commission or concealment of crimes in the core area.

The rationale for jurisdiction in this case is the same under either the "related to" or "arising out of" phrases in the statute. If payments Hubbell received beginning in 1994 were indeed hush money to secure Hubbell's silence vis-à-vis Whitewater, the possible obstruction of justice therein would certainly be a crime "relating to" Whitewater, for it would be an attempt to cover up the wrongdoing afterward. Both the Department of Justice and the defendants admit as much. They nevertheless argue that the tax charges here, as well as wire fraud and mail fraud aimed at keeping the income from the IRS and others who would have resulting claims, are not like the "arising out of" crimes specified in § 593(b)(3): "perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses." The latter, argues DOJ, involve "conduct tending to impede the investigation and prosecution of other crimes." DOJ Amicus Br. at 34. But *any* criminal conduct that could hide the hush money or amplify its value tends to impede investigation and prosecution of the matter being hushed up. The less disclosure of the payments, the less chance that they and their nature will come to light; and the more value Hubbell can squeeze from hush money (by nonpayment of taxes or the like), the more chance it will succeed in preventing his cooperation.[8]

The dissent, disputing these concerns, first argues that the Riady and Revlon payments were in fact disclosed in Hubbell's 1994 tax return. See Dissent at 13. This ap-

[8] We note that the Independent Counsel, apparently focused on the particular procedural implications of "arise out of," did not fully articulate in the district court his theory of the tax violations as themselves reinforcing the cover-up.

pears correct. But it does not seem unreasonable to believe that the other, unenumerated, "consulting fee" payments—made that year and after—were of a piece with the specifically detailed ones.[9] Further, the dissent's apparent belief that no one "could have foreseen" Hubbell's tax evasion scheme, Dissent at 14, is hard to grasp. Surely Hubbell could have anticipated the advantages of sheltering any hush money from the IRS. And at every point where he faced a choice (presumably continuously), he could weigh the benefits of remaining silent with those of speaking up. Tax evasion, both in anticipation and execution, would amplify the expected benefits of silence and thereby increase the chances that the underlying truth—if in fact something was hidden—would remain buried.

Indeed, the history of "aris[ing] out of" indicates a rather liberal view as to the prosecution of downstream matters. The Watergate Special Prosecutor, acting under jurisdiction granted by regulation to pursue offenses "arising out of" the Watergate burglary or "offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility,"[10] obtained convictions of H.R.

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[9] We also realize that not all the tax violations may specifically concern the possible hush money payments—that is, the "consulting fees." It would be ludicrous, however, if the Independent Counsel, in bringing a nondisclosure and evasion case materially concerning such payments, were not able to present the full pattern of nondisclosure and evasion.

[10] The mandate, in full, stated that:

> The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

38 Fed. Reg. 30,738-39 (1973).

Halderman, John D. Ehrlichman, and John N. Mitchell for their actions in attempting to *conceal* a *cover-up*, i.e., to cover-up a cover-up—specifically, for perjury in making false denials of their efforts to cover up the Watergate break-in (one such effort being hush money payments to the burglars and E. Howard Hunt, Jr.). See *United States v. Haldeman*, 559 F.2d 31, 59 (D.C. Cir. 1976). Though the language is different, we find it implausible that Congress intended to give the Independent Counsel a narrower jurisdiction than was exercised by that office's most salient model.

The defense, of course, argues that we cannot consider the hush money hypothesis at all. Unlike Watergate, the prosecutor has not yet charged anyone named in this indictment with the suggested first-level obstruction of justice. Seeming to regard non-indictment as the equivalent of true and complete exoneration (i.e., better than acquittal, which is consistent with a case from which the jury could have found guilt), defendants effectively claim that unless the bridge crime is charged (i.e., the obstruction of justice which is invoked by the Independent Counsel), and presumably then proven at least in the sense of a case on which reasonable jurors could find guilt, it must be assumed completely non-existent.

This requires too much. It is true that if the Independent Counsel had no evidentiary grounds at all for believing that the payments were obstructive—or, indeed, if the evidence clearly showed that the payments were *not* obstructive—he could not rely on such a jurisdictional theory. But defendants' claim is implausible. The De-

partment of Justice itself has recognized that prosecution of a pure non-disclosure crime is suitable when it lacks enough evidence to prosecute. Its Manual, for example, allows prosecutors to use 18 U.S.C. § 1001 (prohibiting false statements) to pursue public corruption crimes when prosecution for the underlying offense "is not practicable." 9A DOJ Manual at 9-1938.123 (1988); see also *United States v. Blackley*, No. 98-3036, slip op. at 9-10 (D.C. Cir. Jan. 26, 1999). It even directs prosecutors to make their decisions based on the nature (in this case, the gravity) of this uncharged underlying offense: "It is DOJ policy not to prosecute . . . under section 1001 *unless* the nondisclosure conceals significant underlying wrongdoing." 9A DOJ Manual at 9-1938.123 (emphasis in original). Perhaps even more tellingly, the Internal Revenue Service has established a substantial "Special Enforcement Program" to investigate people who "derive substantial income from illegal activities," IRS Manual § 4566.1(1), presumably on the assumption that in the case of many criminals (Al Capone being the most notorious example) it is easier to indict and convict them for the nonreporting and concealment of their illegal income than on the illegality of the income-generating activities. The IRS Manual goes on to explain that a person may be targeted for Special Enforcement (and thus for a tax case driven by his possible involvement in *other* criminality) if he "is reasonably believed to be receiving substantial income from an illegal activity that is separate and apart from the alleged tax violations." *Id.* § 4566.1(2)(d). For certain underlying crimes, the Manual states a laxer standard. For the category "IRS racketeer," for example, all that is required is that he be "identified" by a specified high IRS official "as being engaged in organized criminal activities; notorious or powerful with respect to local criminal activities," etc. *Id.* § 4566.1(2)(a).

That does not mean, of course, that the Independent Counsel is bound by the specific provisions of various executive branch manuals. The dissent faults the Independent Counsel for failure to comply with a provision of the DOJ Manual requiring IRS approval as a predicate to tax cases. See Dissent at 18-19. The dissent rests this complaint on § 594(f)(1), which requires the Independent Counsel to follow DOJ policy *except* where "to do so would be inconsistent with the purposes of this chapter." 28 U.S.C. § 594(f)(1). It suggests that the court wrongly "assume[s]" such inconsistency. Dissent at 19. But defendants have never raised a claim under § 594(f)(1). In the absence of any effort to assert the section (and thus any opportunity for the Independent Counsel to defend himself), an inference that its exception applies seems fairly grounded: very little independence would be left in the office if the Independent Counsel had to run to DOJ or other executive branch agencies whenever DOJ established such sign-off procedures.[11]

Thus, while the Independent Counsel is differently situated, other agencies' views on the links between crimes provide useful guidance. It is unreasonable that the Independent Counsel should be hamstrung by the need to prove every proposition necessary for jurisdiction by the exacting standards suggested by the defense. If he were, even his *investigations* would be severely limited, for the statute gives no linguistic hook for requiring a lower standard of proof for investigatory jurisdiction. Furthermore

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[11] As *Morrison* was decided before the "inconsistent with the purposes of this chapter" language was added to § 594(f)(1), see Pub. L. No. 103-270, § 3(e)(1), 108 Stat. 734 (1994), the dissent's reference to the case, see Dissent at 19, is puzzling. Absent a claim that the new exception is itself unconstitutional, or that the amendment renders the provision of an independent counsel unconstitutional in its entirety, *Morrison* appears to have no bearing on our interpretation of § 594(f)(1).

he, unlike every other prosecutor, would be unable to use a prosecution of an easily proved derivative offense as a substitute for prosecution of another, hard-to-prove offense. For the Independent Counsel, a reasonable belief that the linking crime has been committed should suffice.

We are not confronted here with a situation where the money at issue is clearly untainted by possible underlying obstruction. The timing, sources, and extent of the payments make the belief that they were hush money reasonable. That suffices.

* * *

The Supreme Court upheld the constitutionality of Congress's independent counsel arrangements in *Morrison v. Olson*. It is not for lower court judges to undercut that decision by constructions of the Act that prevent this Independent Counsel from performing his duty in a manner reasonably approximating that of an ordinary prosecutor.

II. IMMUNITY

Webster Hubbell invoked his Fifth Amendment privilege against self-incrimination in response to a broad-reaching subpoena *duces tecum* issued by the Office of the Independent Counsel (the "Independent Counsel" or the "government"). He delivered the specified documents only after the Independent Counsel had obtained a grant of use-immunity pursuant to 18 U.S.C. §§ 6002, 6003. Within the personal and financial records he produced, the government found evidence which provided the keystone for a ten-count indictment. Issued by a federal grand jury on April 30, 1998, the indictment alleged that Webster Hubbell, together with his wife Suzanna Hubbell, his tax lawyer Charles Owen and his accountant Michael Schaufele, had committed various counts of fraud and tax evasion. Hubbell moved to dismiss the charges brought

against him, and in the alternative for a *Kastigar* hearing, *see Kastigar v. United States*, 406 U.S. 441 (1972), arguing that the government had violated his Fifth Amendment privilege against self-incrimination in obtaining an indictment based on his immunized document production. Finding that the Independent Counsel had developed its case solely on the basis of records that Hubbell had turned over under the grant of statutory use-immunity, the district court dismissed the indictment with respect to him. As the Independent Counsel had only discovered the extent and nature of Hubbell's alleged tax violations through his response to a government subpoena, the court concluded that the Independent Counsel had improperly turned Hubbell into the primary witness against himself. The government appeals from this ruling, asserting that the district court misconstrued the protection accorded by the federal use-immunity statute, *see* 18 U.S.C. §§ 6002, 6003, as well as the Fifth Amendment's privilege against self-incrimination with which it is coextensive. Because the district court utilized an improper legal standard in assessing the scope of Hubbell's Fifth Amendment privilege, we vacate its decision and remand for it to conduct a hearing as to the extent of the Independent Counsel's knowledge of the records maintained by Hubbell at the time the subpoena issued.

A. *Background*

In the course of its ongoing investigation into possible criminal activity related to Madison Guaranty Savings & Loan Association and the Whitewater Development Corporation, the Independent Counsel learned that Webster Hubbell had received payments from entities "associated with" President William Jefferson Clinton for consulting work allegedly performed after Hubbell's 1994 resignation from his position as the Associate Attorney General.

See In re Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1 (D.C. Cir. Spec. Div. filed Dec. 31, 1997) (application for order of referral to Independent Counsel at 3). Through a preliminary investigation undertaken on its own initiative, the Independent Counsel sought to determine whether the payments were related to what it later described as Hubbell's "unwillingness to cooperate fully with the [Whitewater] investigation, as his plea agreement obligated him to do." *Id.* On October 31, 1996, the federal grand jury in the Eastern District of Arkansas issued a subpoena directing Hubbell to turn over eleven categories of business and income related documents, as well as personal records of his activities and of his family's finances, covering the period from January 1, 1993 to the date of the subpoena.[12]

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[12] The subpoena commanded production of: a) all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by Webster Hubbell, his wife or children (collectively, the "Hubbell family"), including but not limited to the identity of employers or clients of legal or any other type of work; b) all documents reflecting or referring to any sources of money or other things of value received by the Hubbell family, including billing memoranda, draft statements, bills, final statements and/or bills for work performed or time billed; c) copies of all bank records of the Hubbell family, including statements, registers, ledgers, canceled checks, deposit items and wire transfers; d) all documents reflecting time worked or billed by Webster Hubbell during the course of any work performed or to be performed; e) all documents reflecting expenses incurred by and/or disbursements of money by Webster Hubbell for work performed or to be performed; f) all documents reflecting Webster Hubbell's schedule of activities, including but not limited to all calendars, daytimers, time books, appointment books, diaries, records of reverse telephone toll charges, credit card calls, telephone message slips, logs, other telephone records, minutes databases, electronic mail messages, travel records, itineraries, tickets for transportation of any kind, payments, bills, expense backup documentation, schedules, and/or any other document or database that would disclose Webster Hubbell's activities; g) all documents reflecting any retainer agreements or contracts for employment of

On November 91, 1996, Hubbell appeared before a grand jury in the Eastern District of Arkansas and formally invoked his Fifth Amendment privilege against self-incrimination. When questioned, he expressly "de-

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the Hubbell family; h) all tax returns, tax return information, including but not limited to all W-2s, form 1099s, schedules, draft returns, work papers, and backup documents filed, created or held by or on behalf of the Hubbell family, and/or any business in which the Hubbell family holds or has held an interest; i) all documents reflecting work performed or to be performed for the City of Los Angeles, California, the Los Angeles Department of Airports or any other Los Angeles municipal or governmental entity, Mary Leslie, and/or Alan Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions; j) all documents relating to work performed or to be performed by the Hubbell family on the recommendation of Mary Leslie and/or Alan Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or records of other financial transactions; k) all documents related to work performed or to be performed on behalf of Lippo Ltd., the Lippo Group, the Lippo Bank, Mochtar Riady, James Riady, Stephen Riady, John Luen Wai Lee, John Huang, Mark Grobmyer, C. Joseph Giroir, Jr., or any affiliate owned or controlled by such individuals or entities, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expenses receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or records of other financial transactions.

cline[d] to state whether there are documents within my possession, custody, or control responsive to the Subpoena." 11/19/1996 Tr. at 2. The Independent Counsel had previously obtained an order signed by Judge Susan Webber Wright—under 18 U.S.C. §§ 6002, 6003—directing Hubbell to respond and granting immunity "to the extent allowed by law." *In re Grand Jury Proceedings*, No. GJ-96-3 (E.D. Ark. Nov. 14, 1996) (order compelling production of documents). After receiving immunity, Hubbell turned over some 13,120 pages of documents and records. The Independent Counsel then led Hubbell through a series of questions tied to each of the eleven categories of documents requested in the subpoena. With respect to each, the Independent Counsel read the relevant paragraph (or a summary thereof) and then asked either, "Did you provide all those documents?" or "Those are all the records in your possession, custody, or control; is that correct?" Hubbell answered "Yes" to all eleven queries.[13] The Independent Counsel closed the session by inquiring "have you reached or have you made a thorough search or caused a thorough search to be made in response to this Subpoena?" Hubbell again replied "Yes." 11/19/1996 Tr. at 11-12.

The Independent Counsel's search for evidence into whether Hubbell might have obstructed its Whitewater investigation revealed potential violations of the Internal Revenue Code. Using the contents of the documents Hubbell turned over to the grand jury, the Independent Counsel identified and developed evidence that culminated in the prosecution at issue in this case. On April 30, 1998, a federal grand jury in the District of Columbia issued a ten-count indictment alleging that Webster Hubbell, Suzanna Hubbell, Michael Schaufele and Charles Owen[14] had conspired to defraud the United States Department of the Treasury and Internal Revenue Service, the State of Arkansas, the District of Columbia, and the Rose Law Firm of monies owed by Webster and Suzanna Hubbell (collectively, the "Hubbells").[15] The indictment further alleged that all four defendants had endeavored to obstruct and impede the due administration of the revenue laws, in violation of 26 U.S.C. § 7212(a), to evade payment of the proper income tax owed by the Hubbells for the calendar years 1989-1992 and 1994-1995, in violation of 26 U.S.C. § 7201, and committed both mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343. Additionally, Michael Schaufele and Webster Hubbell were each charged with preparing and presenting a fraudulent tax return, in violation of 26 U.S.C. § 7206(2).

Substantively, the indictment alleged that Webster Hubbell had received large payments for consulting services, and then conspired to hide this and other income through elaborate financial machinations. *Inter alia*, the indictment claims that Hubbell under-reported his 1994 consulting income by approximately $74,000, and failed to make any payments towards the tax obligations arising out of either the roughly $375,000 he did acknowledge earning or the $178,000 already owed from the willful

[13] With respect to paragraphs f and j. Hubbell answered "Yes. Subject to the attorney/client privilege." 11/19/1996 Tr. at 9-10.

[14] Michael Schaufele is a certified public accountant, and Charles Owen an attorney. Both are personal friends of Webster and Suzanna Hubbell, and each provided help in the transactions underlying the indictment.

[15] The indictment provides a detailed accounting of the Hubbells' financial position from January 1994 through December 1997, surveying their earnings as well as their spending patterns. It documents all of their employment and investment-related sources of income, trust agreements and trust accounts set up in their name, as well as their personal bank accounts and IRA accounts. It also discusses the tax payments made by the Hubbells, their outstanding tax liabilities and other debts, and their consumer purchases.

tax evasion charge to which he had pled guilty on December 6, 1994.[16] He also made premature withdrawals of more than $233,000 from his Individual Retirement Account ("IRA") without paying the withholding taxes.[17] In December of 1994 and January of 1995, the Hubbells executed three trust agreements—the Webster Hubbell Legal Expense Trust, the Hubbell Children's Education Trust, and the Hubbell Family Support Trust—for each of which Michael Schaufele opened a separate non-interest bearing trust account[18] at the Metropolitan National Bank in Little Rock, Arkansas. In May of 1996, Michael Schaufele opened another non-interest bearing checking account, "for the benefit of Webb and Suzy Hubbell," at Pulaski County Bank in Little Rock, and then used the account to make funds available for the Hubbells' personal spending. In March of 1997, Charles Owen prepared Articles of Organization for a company entitled the Bridgeport Group, LLC, in which Webster and Suzanna Hubbell each owned a forty-nine percent interest

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16 The Hubbells did not make any tax payments in 1995 either, despite incurring an additional tax liability of greater than $112,000.

17 On each occasion, either Hubbell or Schaufele expressly elected that there be no withholding. The final withdrawal involved what the Independent Counsel has labeled the "Pension Account Check Swap." Hubbell had borrowed approximately $29,000 against his profit sharing/pension plan at the Rose Law Firm. Instead of defaulting on the loans, which would have required mandatory payment of 20% withholding, Schaufele arranged a transaction in which the Rose Law Firm paid the $29,000 out of its profit sharing plan into Hubbell's IRA account. Hubbell had previously given checks to the Rose Law Firm covering the same amount, which were cashed directly after the pension money entered Hubbell's IRA. Hubbell thereby avoided the automatic 20% withholding otherwise accompanying a premature pension plan withdrawal.

18 Non-interest bearing bank accounts do not generate Form 1099s, a copy of which would be sent directly to the Internal Revenue Service. *See* 26 C.F.R. § 1.6049-4.

and the Hubbell Children's Education Trust the remainng two percent. When Hubbell entered into a book contract with William Morrow and Co. later that year, his $49,500 advance went into the Bridgeport Group's account at Pulaski Bank. The indictment broadly alleges that the Hubbells utilized these varied financial structures so as to spend down their earnings and assets without paying the nearly $900,000 they owed in taxes to the federal government, the state of Arkansas, and the District of Columbia.

In a July 1, 1998 Memorandum Opinion, the district court granted Webster Hubbell's moton to dismiss the indictment as violative of the order giving him immunity and compelling his response to the grand jury's subpoena *duces tecum*. It found that all of the evidence to be offered by the Independent Counsel at trial derived, either directly or indirectly, from Hubbell's immunized response. Beginning with the proposition articulated in *Kastigar v. United States*, 406 U.S. 441, 453 (1972) that "a grant of immunity must afford protection commensurate with that afforded by the privilege" against self-incrimination, the district court sought to discern the scope of the protection offered by section 6002 through examining the extent of Hubbell's Fifth Amendment privilege. Drawing from the framework sketched in *Fisher v. United States*, 425 U.S. 391 (1976), and reiterated in *United States v. Doe*, 465 U.S. 605 (1984) (*Doe I*), it focused upon the testimonial and incriminating aspects of the act of production. In light cf the government's admission that it had utilized "the information provided by Mr. Hubbell pursuant to the production immunity," *United States v. Hubbell*, 11 F. Supp. 2d 25, 34 (D.D.C. 1998), the court found that Hubbell had not only communicated the authenticity and his possession of the documents, but also implicitly testified as to the very existence of documents

which added to the "sum total" of the government's information against him.[19] Neither the existence of the documents nor their contents was a "foregone conclusion," *Fisher*, 425 U.S. at 411, because the Independent Counsel had no source of knowledge independent of Webster Hubbell's immunized act of production. When it utilized the information contained in Hubbell's response to build a case against him, the court concluded, the Independent Counsel violated Webster Hubbell's rights under the Fifth Amendment and the order of immunity. Accordingly, it dismissed Hubbell's indictment.

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[19] The dissent incorrectly argues that "[h]ere the only interesting issue is the 'existence' theory; possession and authentication seem properly outside the case." Dissent at 1. The district court found that Hubbell implicitly testified as to the existence, his possession, and the authenticity of the documents turned over pursuant to the compelled act of production. *See Hubbell*, 11 F. Supp. 2d at 35 (arguing that the analysis turns on whether Hubbell implicitly testified "only that the documents were authentic, or only that they were in his possession, or did he *also* implicitly testify as to their very existence?") (emphasis added). The district court did focus its discussion on the government's knowledge of the documents' existence, but this emphasis likely emerged from its erroneous reading of *Fisher's* existence prong, *see* discussion *infra* p. 54, together with its reliance on two law review articles arguing that where the government is ignorant as to the existence of subpoenaed documents, the Fifth Amendment's protection necessarily extends to the contents of those documents. *See Hubbell*, 11 F. Supp. 2d at 35 n.13 (citing Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 41-43 (1987); Kenneth J. Melilli, *Act-of-Production Immunity*, 52 OHIO ST. L.J., 223, 258-60 (1991)). While the court emphasized existence, its findings were not so limited. Because we are not just "left with 'existence,'" Dissent at 1, our discussion speaks in general terms of existence, possession and authenticity.

B. ***Discussion***

1. *Hubbell's Privilege Against Self-Incrimination*

a. *The Basic Fifth Amendment Framework for Compelled Document Production*

In delineating the proper scope of the Fifth Amendment's privilege against self-incrimination, the Supreme Court has crafted a framework that requires the presence of each of three distinct elements for an individual to make out a claim. Whether addressed to oral testimony or to documentary evidence, the doctrine necessitates a showing of: i) the compulsion; ii) of testimony; iii) that incriminates. *See Fisher*, 425 U.S. at 409 ("the privilege protects a person only against being incriminated by his own compelled testimonial communications").

Any discussion of the Fifth Amendment's application to the production of documents pursuant to a subpoena *duces tecum* necessarily begins with *Fisher* and *Doe I*. These cases collectively establish the two propositions that structure our inquiry. First, *Fisher* teaches that the Fifth Amendment does not protect the contents of pre-existing, voluntarily prepared documents. Even if written by the hand of the accused, the Fifth Amendment does not extend to writing that was not itself compelled. *See Fisher*, 425 U.S. at 409; *Doe I*, 465 U.S. at 612 n.10 ("If the party asserting the Fifth Amendment privilege has vountarily compiled the document, no compulsion is present and the contents of the document are not privileged."). While the contents of preexisting documents are not protected, the Court has acknowledged that there are testimonial and potentially incriminating communications inherent in the act of responding to a subpoena which may themselves be protected by the Fifth Amedment. *See Fisher*, 425 U.S. at 410 ("The act of producing evidence in response to a subpoena nevertheless has communicative

aspects of its own, wholly aside from the contents of the papers produced."). The enforcement authority that rests behind the issuance of any subpoena provides the requisite compulsion. *See id.* at 409.

Specifically, the act of production communicates at least four different statements. It testifies to the fact that: i) documents responsive to a given subpoena exist; ii) they are in the possession or control of the subpoenaed party; iii) the documents provided in response to the subpoena are authentic;[20] and iv) the responding party believes that the documents produced are those described in the subpoena. *See Fisher,* 425 U.S. at 410; *Doe I,* 465 U.S. at n.13.[21] Nevertheless, not every act that com-

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20 Although this prong has received little independent discusssion, the Court's *Doe I* analysis strongly implies that authenticity refers to something other than the party's belief that surrendered documents match those described in the subpoena. There, the Court discusses authenticity in terms of admissibility under Rule 901 of the Federal Rules of Evidence, recognizing that the act of production could relieve the government of the need to authenticate evidence. *See Doe I,* 465 U.S. at 614 n.13. In this sense, authenticity refers to whether a document is genuine, as opposed to a forgery or fabrication. For example, to the extent that Hubbell turned over a calendar that recorded how he allocated his time, his compelled act of production testifies to the calendar's authenticity.

21 A number of our sister circuits have reduced these four potential statements down to two questions: i) whether production admits the existence, possession or control of the documents; and ii) whether production implicitly authenticates the documents or verifies that they are those sought in the subpoena. *See, e.g., United States v. Fishman,* 726 F.2d 125, 127 (4th Cir. 1983); *United States v. Fox,* 721 F.2d 32, 36 (2d Cir. 1983). Given that the elements are identical, we see no conceptual difference in describing the inquiry as raising four or two potential questions.

We do reject, however, our dissenting colleague's attempt to eliminate outright two of the four statements that, as the Supreme Court instructed in *Fisher* and *Doe I,* are potentially communicated through the act of production. The dissent collapses the first and third statements—existence and authentication—into the fourth,

municates one or more of these statements rises to the level of a protected communication under the Fifth Amendment. As *Fisher* itself illustrates, the act of producing documents in response to a subpoena will not merit protection unless it communicates something of substance to the state. Where the government already has the knowledge that would otherwise be conveyed, "[t]he question is not of testimony but of surrender." *Id.* at 411 (quoting *In re Harris,* 221 U.S. 274, 279 (1911)).

In *Fisher,* the IRS had issued a summons to a taxpayer's attorney to produce documents that had been prepared by the taxpayer's accountant. At the time the subpoena issued, the IRS knew a great deal about the requested documents. In each of the two cases jointly considered by the *Fisher* Court, the IRS had highly specific knowledge as to the existence of the accountant's work papers as well as to their location in the hands of the summoned attorney. *See id.* at 394 ("In No. 74-18 the documents demanded were analyses by the accountant of the taxpayers' income and expenses which had been copied by the accountant from the taxpayers' canceled checks and deposit receipts.").[22] Moreover, as the paper originally belonged to the accountant, they could be authen-

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asking only whether the subpoenaed party has linked the documents produced to those described in the subpoena. *See* Dissent at 5 ("the only sense of 'existence' that is covered by the Fifth Amendment is that which refers back to the subpoena. . . . [to] the witness's implicit match of the documents with the subpoena's description."). This exclusive obsession with what it calls "the context of the subpoena," Dissent at 11, disregards the letter as well as the logic of *Fisher* and *Doe I,* effectively eviscerating the Fifth Amendment's act of production privilege. *See* discussion *supra* pp. 28-29 and note 20; *infra* pp. 40-45, 60-61.

22 In the other case, No. 74-611, the documents entailed an accounting firm's work papers concerning the taxpayer's books and records, retained copies of income tax returns, and retained copies of correspondence between the firm and the taxpayer. *See id.* at 394.

ticated independent of the taxpayer's communicative act of production. The testimony implict in responding to the subpoena was essentially empty, as it did not augment the government's preexisting knowledge perceptibly. In these circumstances—where the "existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers," and where "the Government is in no way relying on the 'truthtelling' of the taxpayer to prove the existence of or his access to the documents," *id* at 411—the Court held that the Fifth Amendment's protections were not implicated. *See id.*

Doe I provides an illustrative counterpoint, as the government there knew little about the documents it subpoenaed. As part of its investigation into corruption in the awarding of municipal contracts, a grand jury issued five separate subpoenas to the respondent that collectively sought a wide range of business records from his various solo proprietorships. In the proceedings below on his motion to quash, the district court had concluded that "enforcement of the subpoenas would compel respondent to admit that the records exist, that they are in his possession, and that they are authentic. . . . The government argues that the existence, possession and authenticity of the documents can be proved without respondent's testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings." *Id.* at 613 n.11. Similarly, the Third Circuit found nothing indicating that the government "knows, as a certainty, that each of the myriad of documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broadsweeping subpoenas is that the Government, unable

to prove that the subpoenaed documents exist . . . is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself." *Id.* at 613-14 n.12. Finding that the government had failed to rebut respondent's claim "by producing evidence that possession, existence, and authentication were a 'foregone conclusion,'" *id.* at 614 n.13, the Supreme Court upheld the lower court's factual determination that complying with the subpoena would involve testimonial self-incrimination. *See id.* at 614.

Against this settled backdrop, the case at bar presents a series of unsettled questions. Our sister courts have yet to reach agreement on the particular elaboration and proper application of the *Fisher* and *Doe I* framework. The degree to which a communication must be testimonial, what the *Doe I* Court described as its "testimonal value," 465 U.S. at 613, before it will invoke the Fifth Amendment's protections necessarily falls somewhere in between the poles represented by *Doe I* and *Fisher*. Precisely where on this continuum a given document production crosses the rubicon remains undetermined. The same can be said for the requisite quantum of incrimination. Finally, since Webster Hubbell produced the subpoenaed documents under a grant of immunity, we must also determine the extent of the protection afforded by section 6002. As *Kastigar* teaches, that inquiry leads us straight back to the scope of the Fifth Amendment privilege. *See* 406 U.S. at 453 (immunity must be commensurate with the Fifth Amendment's protections). Bearing in mind the Supreme Court's prescription that "[t]hese questions perhaps do not lend themselves to categorical answers," and that "their resolution may instead depend on the facts and circumstances of particular cases or classes thereof," *Fisher*, 425 U.S. at 410; *Doe I*, 465 U.S. at 613, we discuss each in turn.

b. *Testimonial Communications*

The court below found that Hubbell's compelled act of production required him to make communications as to authenticity, possession, and existence of the documents. *See Hubbell,* 11 F. Supp. 2d at 35.[23] Sidestepping this conclusion, the Indendent Counsel argues that the Fifth Amendment's protection should not attach because Hubbell's response to the subpoena had insufficient testimonial value. In its view, the documents' existence was what *Fisher* described as a "foregone conclusion." Accordingly, the actual act of production itself—the only compelled communication involved in the case of a document subpoena—did not rise to a level of communication that would merit the Fifth Amendment's protection. We disagree.

The Independent Counsel glosses over what we consider to be an essential component of any inquiry into the testimonial value of a given act of production—the quantum of information possessed by the government before it issued the relevant subpoena. Instead, it makes two separate assertions as to why the documents' existence should be deemed a foregone conclusion. First, the Independent Counsel claims that the most natural reading of *Fisher* counsels against recognizing a testimonial value in the production of ordinary income, financial, and business records like those subpoenaed here. Since people generally possess such records, and since the government cannot be expected or required to know with exactitude the documents that any individual suspected of wrongdoing might have at a given time, the existence of these categories of documents, and of corresponding documents falling

[23] The district court erred, however, in focusing upon the Independent Counsel's knowledge of contents of the subpoenaed documents and the information contained therein. *See* discussion *infra* p. 54.

within the categories, should be regarded as a foregone conclusion. However, the Independent Counsel's argument is not only flawed in logical terms, but it misconstrues Supreme Court precedent in this admittedly abstract and under-determined area of the law. The argument makes the classical error in the field of logic of assuming that the occurrence of future events can be logically deduced from the observations rooted in the past. Empirical knowledge, as David Hume and Bertrand Russell teach, can only be *a postiori,* not *a priori. See* David Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* § IV (L.A. Selby-Biggs ed., 1980); Bertrand Russell, *The Problems of Philosophy,* 60-69 (Galaxy 1959) (the the sun rose today and as far back as the mind remembers does not establish that it will rise tomorrow). Moreover, contrary to the Independent Counsel's characterization, the Supreme Court's cases reflect such an understanding, and require actual knowledge rather than mere inductive generalizations. In *Fisher*, for example, the IRS had precise knowledge of the existence and location of accountant's work papers sought through the challenged subpoena. The taxpayer had also stipulated to both the existence of the documents and that they were those described in the subpoena. *See Fisher,* 425 U.S. at 430 n.9 (Brennan, J., concurring). The actual production of such records accordingly added little, independent of the documents' substance, to the government's quantum of knowledge. Its testimonial value was negligible. In *Doe I,* by contrast, where the government sought a broad range of material which could similarly be classified as ordinary income, financial and business records, the Court held that the act of production would have testimonial value meriting Fifth Amendment protection.[24] While the Court left open the

[24] The dissent attempts to obscure the Court's holdings by arguing that "the implications [of *Doe I*] are quite unclear." Dissent at

possibility in future cases that the government could rebut such a finding by producing evidence that would establish its prior knowledge, the fact that the subpoena sought

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5-6. "The Court relied explicitly and entirely on the 'two courts' rule," and although it rehearsed "the arguments embraced in the courts below," it relied "on the anticipated use of the act of production for authentication of the documents, *i.e.*, use of an indisputably testimonial aspect of subpoena compliance." *Id.* The dissent's dual concerns about the continuing viability of *Doe I* are, respectively, unfounded and inaccurate. The *Doe I* Court did rely upon the "two court" rule in upholding the *fact-findings* of the district and appellate courts below, but that reliance in no way undercuts the vitality of its *legal* holding. The "two-court" rule rests upon the division of labor within the federal courts, and the Supreme Court's station atop this structure as the court of last resort. As the Supreme Court noted in *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982), the case cited for the "two-court" rule in *Doe I*, reviewing courts do not generally operate as finders of fact; they disturb historical fact determinations only when clearly erroneous. Supreme Court Rule 10, which indicates the character of the reasons the Court finds compelling when considering a petition for a writ of certiorari, testifies to the Court's almost exclusive legal focus. As reasons for granting a petition, it lists: inter-circuit splits, conflicts between a circuit court and a state court of last resort on an important federal question, conflicts between two state courts of last resort on an important federal question, and decisions by a circuit court or a state court of last resort on an important legal conclusion that should be settled by the Court. *See* Sup. Ct. R. 10. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Any assertion that the *Doe I* Court's reliance on the "two-court" rule somehow undercuts its precedential force ignores the Supreme Court's understanding of its role atop the judicial branch. The factual conclusions on which the Court relied—that the witness's act of production would involve testimonial self-incrimination by communicating the existence, possession, and authenticity of the subpoenaed documents—were only relevant to the extent that their presence had legal consequences. Despite the dissent's attempt to argue it away, *Doe I* explicitly held that the Fifth Amendment protects against such compelled communication, *see* 465 U.S. at 614, and that the subpoena could not be enforced absent a grant of

income, financial and business records did not undercut the testimonial value of the act of production. *See Doe I*, 465 U.S. at 614 n.13.

The other cases relied upon by the Independent Counsel are equally ineffectual in bolstering its assertions. In *United States v. Rue*, 819 F.2d 1488 (8th Cir. 1987), cited for the proposition that courts should assess the testimonial value of document production by reference solely to a document's category, the Eighth Circuit did not hold—as the Independent Counsel claims—that affixing a label of "financial" or "business" to charcterize a set of records would be sufficient to make their existence, possession or authenticity a foregone conclusion. While the court did speak in terms of categories of documents, it did so because the subpoena itself had sought four separate categories of documents in the same way that the subpoena here sought eleven categories (or contained eleven paragraphs). In *Rue*, before the contested subpoena even issued IRS agents had actually been permitted to examine monthly and year-end statements relating to Dr. Rue's dentistry practice, forms containing individual patient treatment information used to produce those finan-

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statutory use-immunity under 28 U.S.C. §§ 6002, 6003. *See id.* at 617.

The dissent's second argument for limiting *Doe I* is misleading. As the dissent points out, the Court did reference "the anticipated use of the act of production for authentication of the documents." Dissent at 6. In the preceding sentences, however, the Court also noted respondent's argument that "by producing the records, he would tacitly admit their existence and his possession." *Doe I* at 614 n.13. The Court left open the possibility that the government could rebut respondent's claim by producing evidence that would show this testimonial communication to be a foregone conclusion, but its holding clearly embraced all three elements as potentially testimonial. Under *Fisher* and *Doe I*, all three—existence, possession, and authentication—are "indisputably testimonial aspect[s] of subpoena compliance." Dissent at 6.

cial statements, and appointment books. *See Rue*, 819 F.2d at 1490. As to these three categories, the government had first-hand knowledge of the documents' existence and their whereabouts. As to the fourth—patient records detailing services rendered and accompanying charges—Dr. Rue's repeated admissions that the documents existed and the capacity for independent authentication by other witnesses supported the conclusion that any testimony rendered through production was a foregone conclusion. *See id.* at 1493-94.

United States v. Fishman, 726 F.2d 125 (4th Cir. 1983), similarly defies the characterization that the Independent Counsel tries to give it; that generalized knowledge about particular occupations can make the existence of documents a foregone conclusion.[25] In support of this contention, the Independent Counsel cites language in the Fourth Circuit's opinion that "[b]eing business records of Dr. Fishman, their existence in the circumstances of this particular case and his possession or control are self-evident truths, and hardly need to be proven through resort by the Government to the act by the owner in turning them over." *Id.* at 127. However, this sentence comes from a paragraph discussing the question of potential incrimination, and is immediately preceded by the statement that "it is difficult to contemplate how mere existence, possession or control of the documents amounts to *incriminating* evidence." Id. (emphasis added). Moreover, in discussing the testimonial value of the act of production, independent from the question of incrimination, the *Fishman* opinion expressly disavows the reading that the Independent Counsel attempts to place upon it here. Rejecting the contention that Dr. Fishman had implicitly admitted the existence and his possession of the documents, the court noted that Dr. Fishman's "generalized reference to the subpoenaed records acknowledges the existence of a category, but does not make any representation or admission as to what documents fall into it, or whether any particular document is in existence. *Id.* at 127 n.4. We agree with the Fourth Circuit that mere reference to a category of records, and the accompanying belief that certaain individuals should maintain them, cannot and does not eliminate the testimonial value inherent in the act of production. The government's knowledge must have greater depth, and a substantiation that goes beyond mere conjecture. *See Fox*, 721 F.2d at 37 (rejecting argument from revenue agent's experience as to whether physician likely maintains records sought via subpoena).

[25] Given the nature of Hubbell's consulting work following his departure from the Justice Department, the Independent Counsel claims it to be a foregone conclusion at the time of the subpoena that authentic business records existed and were in Hubbell's possession.

Second, the Independent Counsel asserts that it actually had the requisite knowledge of the existence and Hubbell's possession of the documents sought through the grand jury's subpoena. We cannot agree on the record before us. The Independent Counsel relies upon the fact that Hubbell had discussed his consulting work in testimony given before Congress, and that the Department of Transportation Inspector General had issued a report which discussed Hubbell's work for the Los Angeles Department of Airports. Taken together, though, these snippets of information do not come close to establishing the existence of the myriad of documents sought through the subpoena. The knowledge that Hubbell had one or two clients establishes very little else, and certainly does not even approach the level of establishing that Hubbell had done work for fifteen separate clients, let alone the type of records he kept of those activities. The Independent

Counsel also emphasizes its thorough knowledge of Hubbell's financial records as a result of its investigation into charges that Hubbell committed tax and mail fraud while working at the Rose Law Firm. During the period of time with which the Independent Counsel claims familiarity—1989-1992—Hubbell worked as the billing partner at a law firm in Little Rock, Arkansas. During the period of time underlyng this prosecution, Hubbell worked in Washington, D.C. as a consultant, and served out a term in prison for mail and tax fraud counts to which he previously pled guilty. Unless the Independent Counsel can establish its knowledge with a greater degree of specificity, the mere allegation that it was once familiar with Hubbell's finances does not make the existence or possession of the records sought a foregone conclusion. *See Maggio v. Zeitz*, 333 U.S. 56, 65 (1948) (orders enforcing a subpoena "should not be issued . . . merely on proof that at some past time [the summoned documents were] in [the] possession or control of the accused party, unless the time element and other factors make that a fair and reasonable inference").

i. *The Legal Standard*

To formulate an appropriate legal standard as to the degree of prior knowledge needed to render the existence, possession or authenticity of documents a foregone conclusion, it is necessary to return to first principles. *See Doe v. United States*, 487 U.S. 201, 209 (1988) (describing *Fisher* and *Doe I* as applying "basic Fifth Amendment principles" articulated in general terms) (*Doe II*). As the Supreme Court moved away from the doctrine articulated in *Boyd v. United States*, 116 U.S. 616, 634-35 (1886) ("a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . [compels] him to be a witness against himself, within

the meaning of the Fifth Amendment to the Constitution."), and towards a more literal interpretation of the privilege against self-incrimination, *see Fisher*, 425 U.S. at 401 ("We cannot cut the Fifth Amendment completely loose from the moorings of its language . . ."), it jettisoned the personal privacy justification in favor of a rationale tied far more directly to the nature of government compulsion.

The core idea can be traced back at least to Justice Holmes' decision in *Holt v. United States*, 218 U.S. 245 (1910), in which the Court rejected a Fifth Amendment challenge to a witness' testimony establishing that the defendant had donned and fit into a blouse worn in a murder for which he was being tried. Dismissing what he characterized as an "extravagant" allegation, Justice Holmes explained that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.* at 252-53. Justice Holmes thereby drew a fundamental distinction between government action that extorts communication—such action falls within the umbrella of protection afforded by the Fifth Amendment—and government action that merely utilizes the body of the accused as a form of evidence—that kind of action falls outside the Amendment's particular orbit. Subsequent cases echo and develop this focus upon the Fifth Amendment as a barrier against compulsion that acts upon, and requires the exercise of an individual's mental faculties for communication.[26]

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[26] The dissent argues that we "confuse[] the issue with [this] rather odd distinction." Dissent at 6. However, as our ensuing discussion well indicates, this distinction derives directly from the Supreme Court's decisions in *Holt* and its progeny. *See also Pennsylvania v. Muniz*, 496 U.S. 582, 597 (1990) (distinguishing the

Schmerber v. California, 384 U.S. 757, 764-65 (1966) (privilege against self-incrimination does not extend to a compelled blood sample), *Gilbert v. California*, 388 U.S. 263, 265-67 (1967) (privilege does not extend to compelled handwriting exemplar), *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (privilege does not extend to compelled voice exemplar), and *United States v. Dionisio*, 410 U.S. 1, 5-6 (1973) (privilege does not extend to compelled voice sample), all rely upon the essential distinction between compulsion which operates upon the mind by forcing the accused to communicate information or testimony, and compulsion which merely requires him to produce his body for inspection. While in each instance the government draws evidentiary inferences as a result of the compulsion, the Fifth Amendment only protects against those inferences which derive from compelled communication. *See Pennsylvania v. Muniz*, 496 U.S. 582, 593 (1990) (though videotape of the defendant exhibiting signs of intoxication does not violate the Fifth Amendment, videotape showing the defendant's inability to respond to a question about the date of his sixth birthday does); *Doe II*, 487 U.S. at 211 n.10 (describing the *Schmerber* line of cases as distinguishing between "the suspect's being compelled himself to serve as evidence and the suspect's being compelled to disclose or communicate information or facts that might serve as or lead to incriminating evidence"); *Schmerber*, 384 U.S. at 765 ("Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis" of

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compelled presentation of identifying physical characteristics from the requirement that a suspect "communicate an express or implied assertion of fact or belief," as the latter imposes "the 'trilemma' of truth falsity or silence and hence the response . . . contains a testimonial component"). The dissent appears to assume the liberty to write on a clean slate.

appellant's blood); *Dionisio*, 410 U.S. at 5-6 ("It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against compulsory self-incrimination.").

The dissent misreads the letter and logic of *Fisher* and *Doe I* because it fails to grasp the significance of the Supreme Court's distinction between compulsion which uses the body as evidence and that which operates upon the mind by compelling communicative acts. Instead, our colleague attempts to dissect the testimonial and non-testimonial elements of providing blood, voice and handwriting samples. He argues that in giving blood, a person implicitly says, "This is my blood", Dissent at 3; in providing a handwriting sample, the accused admits his ability to write and that the exemplar is his. *See id.* at 4. But because in both these cases, it will require another witness to identify the accused's voice as that of a bank robber, or DNA testing to match the accused's blood with stains left at a crime scene, the giving of blood or an exemplar will not be considered protected testimony. *See id.* at 3. While undoubtedly true, the point is ultimately tangential to the proper inquiry. The real question at issue in *Holt*, *Schmerber*, *Wade*, and *Gilbert* was whether the government had merely used the accused's body as a form or piece of evidence, or whether the government had to compel communicative testimony to obtain the evidence it needed. Justice Holmes' *Holt* opinion likened trying on a blouse to simply sitting before the jury and allowing them to compare your features to that contained in a photograph of the perpetrator. *See* 218 U.S. at 253. While it can be argued that the accused implicitly testified about something in each of the cases cited by the dissent—that this is my blood containing my unique DNA, that this is my face with all of its characteristic ideosyncracies, that this is my body with a particular shape and

size which fits into this blouse—that testimony was irrelevant to the Fifth Amendment inquiry because it required no act of will on his part as to what he would communicate. The same reasoning applies to a compelled submission to fingerprint analysis. The suspect can be said to be communicating that this is my hand and it contains five fingerprints unique to my person, but in reality the individual has merely been compelled to make himself available as a "source of 'real or physical evidence.'" *Schmerber*, 384 U.S. at 764. For purposes of Fifth Amendment analysis, it is dispositive that the government has no need to rely upon the witness's truthtelling to secure the evidence it seeks.

The dissent cites to *Holt*, *Schmerber*, *Wade*, and *Gilbert* for the proposition that where the government can draw a link between evidence and the accused, independent of the accused's testimony, the Fifth Amendment does not apply. *See* Dissent at 2-5, 11. None of these stands for this general proposition. All of the cases focused on whether the act in question was communicative or noncommunicative—whether it relied upon the individual's mental faculties and truthtelling capacity or merely used the body as a source of physical evidence—and not on whether the prosecution could link evidence to the accused without relying on his testimony.[27] In each,

[27] The dissent's almost exclusive focus on blood and handwriting stems from its conflation of fundamentally separate inquiries. It measures the testimonial character of a compelled subpoena response by asking, after the fact, whether produced documents can be independently linked back to Hubbell. While these questions go to the *testimonial value* of a given act of production, which is properly assessed by asking whether the existence, possession or authenticity of the documents was a foregone conclusion, the dissent assumes that they instead speak to the prior inquiry into whether the act of production is *testimonial*. *Fisher*, *Doe I* and *Braswell* have already settled this question, teaching that the act of producion is inherently communicative. Accordingly, these cases repudiate the dissent's assumption.

the Supreme Court concluded that there had been no testimony; accordingly, the Fifth Amendment did not apply. *See, e.g., Schmerber*, 384 U.S. at 761 n.5 (dis-

The dissent also misreads *Baltimore Dept. of Social Servs. v. Bouknight*, 493 U.S. 549 (1990), conflating its inquiry into whether the state could compel production despite Fifth Amendment objections with a separate and conceptually distinct examination of whether that compelled act of production would communicate testimony. In *Bouknight*, the Court held that a mother could not refuse a juvenile court order to produce her child, whom social services suspected she abused, by asserting her privilege against self-incrimination. The Court based its decision on the fact that the child—Maurice—had been declared a "child in need of assistance," *id.* at 552, a judicial determination asserting jurisdiction over Maurice and assigning oversight responsibilities to the Baltimore City Department of Social Services. Ultimately, the *Bouknight* Court confronted a single question—whether the state juvenile court could compel Bouknight to produce her child—and held that Maurice's mother had no choice but to comply. Although the Court concluded that Bouknight could "not invoke the privilege to resist the production order *because* she has assumed custodial duties related to production and because production is required as part of a non-criminal regulatory regime," *id.* at 555-56 (emphasis added), the dissent mistakenly approaches the case as though it rested on a finding that production would not be testimonial. Because it does not, *see id.* at 561-62 (explicitly referencing Fifth Amendment limitations on using any *testimonial aspects* of Bouknight's compelled producing in subsequent criminal proceedings), the dissent's focus upon parsing the mental from the physical components of any act producing Maurice is irrelevant to our (and any) general Fifth Amendment analysis. *See* Dissent at 6-8.

In *Bouknight*, the Court assumed *arguendo* that compelled production would involve sufficient testimonial incrimination to implicate the Fifth Amendment, *see id.* at 555—a critical fact our dissenting colleague ignores. In fact, to the extent that the Court did touch upon the testimonial components of the act of production, its minimal discussion reinforces our reading of *Fisher* and *Doe I*, and directly refutes the dissent's. For example, the Court noted that while producing Maurice would implicitly *testify* to his existence and authenticity, that communication was "*insufficiently incriminating*." *Bouknight*, 493 U.S. at 555. Because the state al-

tingushing acts communicative in nature from the non-communicative); *Doe II*, 487 U.S. at 211 n.10 (the *Schmerber* line of cases "distinguished between the suspect's being compelled to serve as evidence and the suspect's being compelled to disclose or communicate information or facts that might serve as or lead to incriminating evidence"). However, as the *Schmerber* Court went on to state "[i]t is clear that the *protection of the privilege reaches an accused's communications, whatever form, they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers.*" *Id.* at 764 (emphasis added).

The rationale underlying the act of production trilogy—*Fisher*, *Doe I*, and *Braswell v. United States*, 487 U.S. 99 (1988)[28]—with its emphasis on compelled truthtelling, emerges directly out of this focus upon whether the state operates upon a reluctant witness' mental faculties to

ready knew of his existence, and presumably his social worker could testify as to his identity, both elements were essentially a foregone conclusion. *See id.* (citing *Fisher's* foregone conclusion analysis). *See also* discussion *infra* pp. 45-50. The dissent's extensive effort to distill contrary principles from *Bouknight* is misguided and unsubstantiated; *Bouknight* cannot and does not bear the meaning that the dissent seeks to assign it.

[28] In *Braswell*, the Court held that a custodian of corporate records could not evade a subpoena seeking records from his corporation through asserting his Fifth Amendment privilege against self-incrimination. Although Mr. Braswell effectively served as the corporation's sole owner and officer—his wife and mother were nominal officers so as to satisfy a Mississippi law requiring corporations to have three directors—he necessarily operated in a representative capacity, under the "collective entity" doctrine, in his duties as custodian. *See* 487 U.S. at 110. When acting as a corporate agent, the Court held, an individual cannot assert his personal Fifth Amendment rights; similarly, the act of production can only be used against the corporation and not against the custodian. *See id.* at 118 & n.11.

compel testimony. *See Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964) (rooting the Fifth Amendment privilege *inter alia* in "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . ."); *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) (same); *Curcio v. United States*, 354 U.S. 118, 128 (1957) (forcing custodian of union records who lacks possession to testify as to their whereabouts "requires him to disclose the contents of his own mind. . . . That is contrary to the spirit and letter of the Fifth Amendment."). That is, the act of producing documents in response to a subpoena potentially involves the Fifth Amendment's protections precisely because the subpoenaed party is forced to undertake some communicative act in answering. *See Fisher*, 425 U.S. at 410; *Doe I*, 465 U.S. at 612. Each of the four potential statements that adhere to the act of production—existence, possession, authenticity, and the belief that the produced documents match the subpoena's terms—can merit protection because they entail "the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind . . . " *Doe II*, 487 U.S. at 211 (internal citations omitted).[29] In terms of the dichotomy articulated in *Holt* and its progeny, they fall on the side of the communicative and testimonial.

In assessing the testimonial value of an act of production, it makes sense to reference the anti-extortion principle which has become the motivating force of self-

[29] In *Doe II*, the Court upheld an order compelling the target of a grand jury investigation to sign a series of consent forms authorizing banks in the Cayman Islands and Bermuda to disclose records for any account to which petitioner was a signatory. Since signing the consent forms did not involve or imply an assertion of fact or a disclosure of information, the Court concluded that the order did not run afoul of the privilege against self-incrimination.

incrimination doctrine. In light of *Fisher*, *Doe I*, and *Doe II*, we conclude that the testimonial value varies directly with the quantum of information that the government seeks to extract through compelling the expression of the contents of an individual's mind and inversely with the quantum of information in the government's possession at the time the relevant subpoena issues.[30] *Cf. Muniz*, 496 U.S. at 597 ("the cases upholding compelled writing and voice exemplars did not involve situations in which suspects were asked to communicate personal beliefs or knowledge of facts . . ."). Although the Supreme Court has not explicitly stated as much, our conclusion is fully in accord with, and even helps to explain, the Court's repeated statement that the question of whether tacit averments are sufficiently testimonial as to merit the Fifth Amendment's protection depends "on the facts and circumstances of particular cases or classes thereof."[31]

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30 The former constitutes the more important formulation, as it ties testimonial value directly to the disparity beween the government's knowledge and that of the subpoenaed party. It focuses directly upon the government's need to access the contents of an individual's mind. By contrast, although the government may have little information with respect to whether a suspect's DNA or fingerprints match those of a suspected culprit, and the government will extract a great deal of information from a blood sample or a handwriting exemplar, neither probes the contents of one's mind to compel testimony. Everything of evidentiary value traces to the body as a source "real," as opposed to communicative, evidence.

31 Our dissenting colleague remarks that "[t]he most confusing part of *Fisher* is the language that the courts have taken to tie 'foregone conclusion' closely to the 'testimonial' analysis and vice versa." Dissent at 3. Because we think that the "foregone conclusion" limitation emerges directly from the logic underlying the act of production doctrine, we do not share our colleague's confusion. *Fisher* and *Doe I* state the general proposition that the act of producing documents in response to government subpoena communicates. It provides testimony rather than physical or real evidence, and this testimony comes in four recognized forms. *See* discussion *supra* p. 29. However, in that subset of cases in which the testimonial value of this communication is minimal—exemplified by *Fisher* itself—that testimony will not merit the Fifth Amendment's protection. Where the government need not rely upon the truthtelling of the witness, because it has prior knowledge of the information that will be communicated through the act of production, "no constitutional rights are touched." *Fisher*, 425 U.S. at 411 (quoting *In re Harris*, 221 U.S. at 279). Where all that would be communicated is a "foregone conclusion," "the question is not of testimony but of surrender." *Id.*

The foregone conclusion analysis, which examines the testimonial value of the accused's act of production, has nothing to do with the general question of whether the act of producing documents in response to a subpoena is testimonial. *Fisher*, *Doe I*, and *Braswell* all teach that it is. The Court's discussion of handwriting and blood samples goes only towards answering this prior question. For example, while the Court notes that an accused forced to give a handwriting exemplar implicitly admits that he can write and that the writing produced is his own, it declares the first admission a "near truism" and the second "self-evident." *Fisher*, 425 U.S. at 411. "[A]lthough the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be *sufficiently testimonial* for purposes of the privilege." *Id.* (emphasis added). By contrast, the act of production, which is inherently testimonial, may or may not be *sufficiently testimonial* for purposes of the privilege. The Fifth Amendment will not necessarily apply to all such communications; it "depends on the facts and circumstances of particular cases or classes thereof." *Id.* at 410.

32 Our dissenting colleague contends that these cases can be lined up in part "because the factual detail of the cases is so skimpy and the majority's test so elastic." Dissent at 10. However, as will become evident from our discussion, the pejorative label "skimpy" rightly attaches only to the extent of the government's knowledge in those cases where courts have recognized a valid Fifth Amend-

Fisher, 425 U.S. at 410; *Doe I*, 465 U.S. at 613; *Braswell*, 487 U.S. at 103. Moreover, although our sister courts have undertaken particular analyses in light of general Fifth Amendment principles, the conclusions they have reached in individual cases can largely be reconciled with this formulation.[32]

In those cases in which our sister circuits have declined to recognize the existence of a Fifth Amendment privilege, the government has usually had extensive information regarding the documents it subpoenaed. While the act of production would still force an individual to communicate knowledge and to reveal the contents of his mind, the government would in no way be relying upon the communication inherent in the act. It is only in those instances where the gap separating the government's knowledge with respect to the existence, possession, location or authenticity of documents from that of the subpoenaed party is wide that our sister circuits have recognized a testimonial value sufficient to merit the Fifth Amendment's protections.

In *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983), for example, the IRS had issued highly specific subpoena reflecting detailed knowledge of the documents it sought. In particular, the summons asked for the production of "[a] ring binder containing 8" by 12" sheets (approximate), 3 inches deep, containing cancelled checks, bank statements, invoices, receipts glued to the accountants worksheets for the years 1976 and 1977." *Id.* at 1081. Since the existence of the binder, its contents, and their possession by Mr. Schlansky were not in dispute, and since authentication was available from other sources, the Sixth Circuit concluded that Schlansky's response to the subpoena would not involve testimonial self-incrimination. The Second Circuit reached a similar result in *United States v. Praetorius*, 622 F.2d 1054 (2d Cir. 1979), in which the government had subpoenaed a passport in relation to its investigation of a heroin importment privilege. In all of the cases we discuss, the factual details are rich and revealing. While, for the sake of brevity, we have limited our recounting to a relevant summary, we refer our colleague's attention to the appropriate pages in the federal reporter.

tation ring. Since the court below had found that the existence and location of the passport were not in question, the Second Circuit affirmed its conclusion that the act of production did not have sufficient testimonial value to implicate the Fifth Amendment. *See id.* at 1063.

In re Steinberg, 837 F.2d 527 (1st Cir. 1988), and *United States v. Clark*, 847 F.2d 1467 (10th Cir. 1988) also fall within the pattern of cases in which the government's knowledge is nearly on par with that of the subpoenaed individual. In *Steinberg*, the government sought a series of notebooks maintained by members of Lyndon LaRouche's security staff in which they detailed the progress of a federal investigation into LaRouche's 1984 Presidential campaign as well as the staff's internal planning measures. As a government witness had testified to the existence and contents of the notebooks, as well as to Steinberg's possession, the court found that the subpoena did not implicate the Fifth Amendment. *Steinberg*, 837 F.2d at 530. In *Clark*, an IRS summons sought accountant's work papers and the personal records that the taxpayer had given his accountant, both of which were known to have subsequently been given to the taxpayer's attorney. Finding the existence of the work papers to be a foregone conclusion, and that the underlying records would be reflected therein, the Tenth Circuit refused to recognize a Fifth Amendment privilege. *See* 847 F.2d at 1472-73. *See also United States v. Stone*, 976 F.2d 909, 911 (4th Cir. 1992) (in Department of Energy investigation into relationship between department employees and owner of business receiving DOE contracts, where government knew that appellant owned a beach house and had sufficient knowledge that he rented the house out between 1983 and 1989 to request a list of renters, subpoena seeking utility bills and rental records targets documents whose existence and possession are a foregone conclu-

sion); *In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87 (2d Cir. 1993) (where defendant has testified before SEC as to possession and use of diary, and has previously turned over a copy in which government suspects adulteration, subpoena for original does not implicate Fifth Amendment).

By contrast, those cases in which our sister courts have recognized a Fifth Amendment privilege consistently reveal a gross information asymmetry between the government and the subpoenaed party, which can be bridged only by getting at the contents of the latter's mind. In *United States v. Fox*, 721 F.2d 32 (2d Cir. 1983), the IRS issued a wide ranging subpoena seeking an expansive array of personal, financial and business records of Dr. Martin Fox. At the time, the IRS had copies of his 1979-1981 tax returns and a transcript of third-party payments to the Foxes during 1979. Rejecting the government's contention that the testimonial value of producing the subpoenaed documents would be minimal, the court reasoned that in seeking all of the books and records of the Fox's sole proprietorship, the government had attempted "to compensate for its lack of knowledge by requiring Dr. Fox to become the primary informant against himself." *Id.* at 38. Since the IRS could establish neither the existence nor the authenticity of the records sought, its subpoena implicated the Fifth Amendment's protections. *In re Grand Jury Proceedings on February 4, 1982*, 759 F.2d 1418 (9th Cir. 1985) involved a similarly broad subpoena, demanding personal journals, files related to the purchase of fishing boats, stock transactions, and receipts. Reasoning that the production of documents belonging to and prepared by the subpoenaed party would relieve the government of the need to establish their existence, possession and authenticity, the court held that the act of production would be sufficiently testimonial to re-

quire protection if incriminating. *See id.* at 1421. Finally, in *In re Grand Jury Proceedings, Subpoenas for Documents*, 41 F.3d 377 (8th Cir. 1994), the government subpoenaed all of appellants' original records from any business in which they owned an interest as well as all evidence of their financial transactions for a four-year period. Noting that the subpoena did not describe the requested documents in specific terms, the court found that the government had failed to establish an independent source of authentication. Focusing on the discretionary judgments involved in responding to a subpoena, the court pointedly remarked that "the broader, more general, and subjective the language of the subpoena, the more likely compliance with the subpoena would be testimonial." *Id.* at 380.

Although the fit is by no means perfect, the cases assessing the testimonial value of an act of production form a pattern that correlates strongly with the government's need to draw from the mental faculties of the responding party. Where the information asymmetry is large, and where the government's prior knowledge is minimal, the act of production will likely communicate either the existence, possession or authenticity of the subpoenaed documents.

ii. *Assessing the Government's Knowledge*

The case at bar highlights a further doctrinal ambiguity, which is again tied to elaborating the extent of knowledge that the government must have in order to justify a conclusion that the communicative aspects of the act of production are a "foregone conclusion" under *Fisher* and *Doe I*. Rehearsing an argument discussed above, the Independent Counsel contends that government knowledge of the existence and possession of documents should be assessed solely through examining cate-

gories or classes of documents. While it thus argues that the court should measure whether the information sought through a subpoena is a foregone conclusion at a high degree of abstraction—speaking in generalized terms of business, financial and tax records—the Independent Counsel provides no support for its contention. Moreover, any instruction to filter review of the government's knowledge through categories is inherently an empty one, for it fails to address the recurring level of generality problem. *See generally*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (discussing the malleability and outcome-determinative nature of levels of generality); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (discussing the appropriate level of generality at which to define fundamental rights). While a useful method of sorting information, categories do not present themselves as Platonic forms with inherent shape or universal meaning. Rather, defined by reference to their particular applications, they can be abstracted upwards or downwards (through varying levels of generality) in order to embrace or reject concrete instances. *See generally* Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe trans., 3d ed. 1968) at §§ 137-242 (general concepts do not dictate their concrete applications, but rather are defined through them). As *Doe I* well illustrates, the government cannot simply subpoena business records and then claim the requisite knowledge for purposes of the Fifth Amendment by pointing to the existence of a business.[33] The Independent Counsel's assertion that its

[33] Nor can the government obtain documents by compelling their production, and then claim that the act of production was insufficiently communicative to merit the Fifth Amendment's protection because the papers themselves provide independent evidence of their own existence. Where the government had no information as to their potential existence prior to the compelled response, its *a*

knowledge of Hubbell's status as a consultant and a taxpayer carried with it a concomitant awareness of the existence and possession of his consulting and tax records

posteriori knowledge is inextricably linked with the communicative testimony inherent in the subpoena response.

The dissent attempts to differentiate two concepts of existence, only the first of which it claims to be covered by the Fifth Amendment. In the dissent's view, the existence prong of *Fisher* refers only to the statement, made in a given act of production, that "Yes, these are the records you described in the subpoena." Dissent at 5. It differentiates this definition of existence from the more sweeping view that connotes "in being," *id.*, claiming that the latter definition is somehow foreclosed by *Schmerber*, *Wade*, and *Gilbert*. The dissent's reading falters on two separate grounds. First, and most important, it is explicitly contradicted by *Fisher*, *Doe I*, and *Braswell*. In each case, the Supreme Court concluded that the act or production "tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It *also* would indicate the taxpayer's belief that the papers are those described in the subpoena." *Fisher*, 425 U.S. at 410 (emphasis added); *Doe I*, 465 U.S. at 613; *Braswell*, 487 U.S. at 103. The statement which follows the word "also" corresponds directly with the dissent's interpretation of the word existence. However, the court states what has become known as the "authenticity" prong separate from its recognition that the act of production communicates the existence of the documents sought in a subpoena. As far as we can tell, our dissenting colleague offers the first opinion attempting to read the existence prong of *Fisher*, reiterated in *Doe I* and *Braswell*, out of existence. We reject this attempt to render an independent part of the *Fisher* analysis redundant.

Ignoring the text of *Fisher*, *Doe I*, and *Braswell*, the dissent seeks support for its parsimonious definition through a misconstruction of *Schmerber*, *Wade*, and *Gilbert*. It argues that existence qua existence "is as 'self-evident' as the blood and its characteristics in *Schmerber*, the voice samples and their characteristics in *Wade*, and the handwriting and its characteristics in *Gilbert*." Dissent at 5. Our dissenting colleague fails to recognize, however, the legal import of the fact that all humans have blood and that nearly all can speak and write. In each case, the Supreme Court relied upon this self-evident quality to conclude that requiring the accused to provide a sample merely required the use of his body as physical evidence. They were analogous to a "compulsion to submit to fingerprinting, photographing, or measurements . . . , to appear in

similarly falls short. The Fifth Amendment's proscription against compelled self-incrimination does not hinge on tautology.

The basic problem with the Independent Counsel's contention is that it fails to recognize that there are no essential classes or categories of information. While the Independent Counsel attempts to argue that ordinary business, financial and tax records are the appropriate categories through which to assess Hubbell's act of production, other courts have utilized those terms in a different capacity. The Eighth Circuit in *Rue*, for example, used the term to reference the various paragraphs of the subpoena in question, *see Rue*, 819 F.2d at 1490, while the Sixth Circuit has utilized it as an open-ended device for classifying different levels of government knowledge. *See Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir. 1985) (inviting the district court to break its assessment of the government's knowledge down into whatever document categories it sees). The level of generality problem arises precisely because these questions "do not lend themselves to categorical answers" and "may instead depend on the facts and circumstances of particular cases or classes thereof." *Fisher*, 425 U.S. at 410; *Doe I*, 465 U.S. at 613.

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court, to stand, to assume a stance, to walk, or to make a particular gesture," *Schmerber*, 384 U.S. at 764, because in each case they were considered noncommunicative or insufficiently testimonial. *See* discussion *supra* pp. 39-43. The Supreme Court relied upon this distinction between "compelling 'communications' or 'testimony'" and compulsion that "makes a suspect or accused the source of 'real or physical evidence,'" *id.*, in articulating the communicative elements of the act of production. It concluded that a compelled subpoena response testified to existence qua existence. Accordingly, we refuse to join our dissenting colleague's attempt to overturn the holding articulated in *Fisher*, and reiterated in both *Doe I* and *Braswell*.

Recognizing that the inquiry will always be highly contextual and fact-intensive, we agree with the Second Circuit that the government must establish its knowledge of the existence, possession, and authenticity of subpoenaed documents with "reasonable particularity" before the communication inherent in the act of production can be considered a foregone conclusion.[34] *See In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 93 (2d Cir. 1993). In making his assessment, though, the focus must remain upon the degree to which a subpoena "invades the dignity of the human mind," *Doe II*, 487 U.S. at 219-20 n.1 (Stevens, J., dissenting) and on the quantum of information as to the existence, possession, or authenticity of the documents conveyed via the act of production.

In the proceedings below, the court's *Fisher/Doe I* analysis led it to conclude that Hubbell's compelled act of

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[34] The dissent would discredit our holding by asserting that "the operational meaning of the 'act of production' doctrine in our circuit will largely turn on district courts' discretion in this metaphysical classification of prosecutors' knowledge." Dissent at 10. We do not share the dissent's disdain for factual inquiries into the extent of a government official's knowledge, which forms a large part of ordinary judicial decision-making. Under the Fourth Amendment, for example, the probable cause determination with respect to both arrests and searches depends upon an assessment of the government's knowledge as to the likelihood that a suspect has committed a crime or that incriminating items will be in a particular place. Similarly, district judges weigh the validity of a *Terry* stop, *see Terry v. Ohio*, 392 U.S. 1, 21-24 (1968), by assessing whether a police officer had reasonable articulable suspicion that the suspect was potentially involved in criminal activity. A search for weapons incident to a *Terry* stop is also assessed for whether the officer had a reasonable, particularized suspicion that the individual was armed. *See Alabama v. White*, 496 U.S. 325, 330 (1990) ("Reasonable suspicion . . . is dependent upon both the content of information possessed by police and its degree of reliability."). To the extent that any assessment of the government's knowledge requires something in the nature of a "metaphysical classification," we have no doubt that the district courts are up to the task.

production required him to make communications as to the existence, possession and authenticity of the subpoenaed documents. However, when articulating these factual findings as to the Independent Counsel's knowledge of the documents' existence—as is proper under *Fisher* and *Doe I*—the district court improperly conflated this *Fisher/Doe I* inquiry with the conceptually separate and temporally subsequent *Kastigar* inquiry.[35] *See Hubbell*, 11 F. Supp. 2d at 36 ("The assertion of counsel does not begin to show that the independent counsel's knowledge of the documents or their contents was a 'foregone conclusion' "); *id.* at 37 n.15 ("The 'existence' prong of the *Fisher* analysis goes to the existence of the information contained in the documents, not to the fact that the witness keeps records."). Since the Fifth Amendment only touches the testimonial aspects of a subpoena response, the district court should have independently examined the extent of the government's knowledge as to the existence, possession or control, and authenticity of the subpoenaed documents—*i.e.*, the testimonial components of the act of production. The inquiry should have focused upon whether the government knew that the documents existed at all, and not upon whether the government knew of the existence of the information contained therein. *See id.* at 35 ("The independent counsel does not claim that he knew *any* of the facts relevant to the charges in this indictment at the time of the subpoena") (emphasis in original). Only the former is communicated through the act of production itself.

As the district court's fact findings relevant to the *Fisher/Doe I* inquiry are inextricably linked with its assessment of the government's substantive knowledge of the alleged offenses, we cannot decide on the record be-

[35] *Kastigar* is discussed *infra* pp. 59-64.

fore us whether Hubbell's act of production had sufficient testimonial value to invoke the Fifth Amendment's protections. The subpoena speaks in vague terms, and the detail with which it goes through the possible forms that the information sought could take, *see supra* note 12, at the very least hints that the government had no knowledge as to whether Hubbell maintained comprehensive records of the way he allocated his time. Moreover, it is unclear how the Independent Counsel became apprized of the Pulaski bank account, the three trust accounts, the Bridgeport Group, the check swap, and Hubbell's early withdrawals from his IRA accounts, each of which figure prominently in the indictment.[36] *See* discussion *supra* pp. 25-26. The Bridgeport Group had not been organized, its account at the Pulaski Bank had not been opened, and Hubbell had neither signed a book contract with William Morrow and Company, Inc., nor received his advance on the day the subpoena issued. The extent of the Independent Counsel's knowledge of Hubbell's recordkeeping practices is also uncertain. On remand, the district court should hold a hearing in which it seeks to establish the extent and detail of the government's knowledge of Hubbell's financial affairs (or of the paperwork documenting it) on the day the subpoena issued. It is only then that the court

[36] According to the district court, the Independent Counsel conceded in oral argument that it "learned of the Bridgeport Group, the ['for the benefit of'] account at Pulaski County Bank, and the 'pension account check swap' charged in the indictment only through the documents." *Hubbell*, at 35. By contrast, the Independent Counsel asserts that it discovered the account and the check swap through interviews with and documents produced by Michael Schaufele, the Rose Law Firm, and financial institutions. *See* Appellant's Br. at 44-45 n.9. On remand, the Independent Counsel bears the "heavy burden" of demonstrating a source of knowledge completely independent from and untainted by the compelled act of production. *See Kastigar*, 406 U.S. at 461-62; *Braswell*, 487 U.S. at 117.

will be in a position to assess the testimonial value of Hubbell's response to the subpoena. Should the Independent Counsel prove capable of demonstrating with reasonable particularity a prior awareness that the exhaustive litany of documents sought in the subpoena existed and were in Hubbell's possession, then the wide distance evidently traveled from the subpoena to the substantive allegations contained in the indictment would be based upon legitimate intermediate steps. To the extent that the information conveyed through Hubbell's compelled act of production provides the necessary linkage, however, the indictment deriving therefrom is tainted.

c. *The Question of Incrimination*

Under the third prong of the *Fisher* and *Doe I* analysis, compelled testimony must be incriminating before it merits Fifth Amendment protection. *See Fisher*, 425 U.S. at 409 ("the privilege protects a person only against being incriminated by his own compelled testimonial communications"). The mere assertion of the privilege by the party whose testimony the government seeks is insufficient; "his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). With respect to a subpoena for documents, the privilege cannot be invoked merely because the subpoenaed items contain incriminating information, the act of production must communicate and incriminate. *See Fisher*, 425 U.S. at 410. To have "an incriminating effect," *Doe I*, 465 U.S. at 612, the party claiming the privilege must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Id.* at 614 n.13 (citations omitted). *See also Butcher v. Bailey*, 753 F.2d at 470 (showing that document production would incriminate "will be sufficient if the court can, 'by

the use of reasonable inference or judicial imagination, conceive a sound basis for a reasonable fear of prosecution' ") (quoting *In re Morganroth*, 718 F.2d 161, 169 (6th Cir. 1983)).

Breaking the act of production down into its individual testimonial components, the Independent Counsel argues that an admission of either the existence or possession of "ordinary" business and financial records can almost never be incriminating. Similarly, the implicit authentication of documents would only incriminate were a subpoena to be phrased in such a way as to expressly request production of the instruments of criminality. We disagree, as both logic and Supreme Court precedent rebut the claims of any such niggardly interpretation. First, the Fifth Amendment's protections cannot depend upon such trivial semantic distinctions that the government can sidestep its application by requesting "all income records" instead of "all incriminating income records." Artful phrasing does not suffice. Moreover, *Doe I* and *Doe II* belie such a narrow reading of the Fifth Amendment's protections. In *Doe I*, the Supreme Court found, on the basis of the findings presented, that Doe faced a "real and substantial" risk of incrimination were he to produce the documents sought in the government's subpoena—a subpoena seeking ordinary business records, not "incriminating" business records. *See* 465 U.S. at 614 n.13. As the government had no independent knowledge of the existence or his possession of the documents listed in the subpoenas at issue, and since the act of production would tacitly admit their existence and his control over them, and provide a source of authentication, the court found the threat of incrimination to be "clear." *See id.* A cursory comparison of the subpoena at issue in *Doe I* with that of the case at bar reveals marked similarities, *see id.* at 607 n.1, and we think it equally clear that Hubbell faced a real and sub-

stantial threat of incrimination in responding. It is hard to divine another reason why the Independent Counsel would have sought an order of immunity in the first place.

Doe II's discussion of the incrimination requirement reinforces our conclusion. Although the decision in *Doe II* turned on the question of whether signing a general release form involved an assertion of fact, the Court also discussed the proper shape of the incrimination inquiry. The *Kastigar* Court, it argued, "implicitly concluded that the privilege prohibits 'the use of compelled testimony, as well as evidence derived directly and indirectly therefrom.' 406 U.S. at 453. The prohibition of derivative use is an implementation of the 'link in the chain of evidence' theory for invocation of the privilege, pursuant to which the 'compelled testimony' need not itself be incriminating if it would lead to the discovery of incriminating evidence." *Doe II*, 487 U.S. at 208 n.6.

In the present case, it appears that Hubbell's testimony likely involved both direct and indirect incrimination. Acknowledging the existence of an interest-bearing checking account the income from which the subpoenaed party had failed to report on his tax returns would directly incriminate; it would inform the government of a known source of unreported income. *See United States v. Argomaniz*, 925 F.2d 1349, 1354 (11th Cir. 1991) (where defendant failed to file tax returns for a series of years, admitting the existence of documents relating to income through production would establish essential elements of criminal failure to file a tax return). If Hubbell had records of that account in his possession or control, that fact could further incriminate. *See Smith v. Richert*, 35 F.3d 300, 304 (7th Cir. 1994) (as the mere turning over of 1099s and W-2s in response to a subpoena could eliminate defense of lack of knowledge or possession, it is

incriminating). Similarly, in acknowledging the existence of the Bridgeport Group and its bank account at Pulaski Bank, Hubbell provided a link in the chain of evidence used by the Independent Counsel to substantiate the criminal charges against him—an instance of indirect incrimination.

Given the procedural posture of this case, it would be premature for us to review the incrimination question any further at this juncture. Until the district court determines on remand precisely what testimony Hubbell provided through his act of production, focusing on the extent of the government's knowledge as of the date of the subpoena and on whether Hubbell's testimony added "to the sum total of the government's case against him," *United States v. Edgerton*, 734 F.2d 913, 921 (2d Cir. 1984) (quoting *Fisher*, 425 U.S. at 411), it cannot make the appropriate fact findings as to what extent that testimony is incriminating. *See Doe I*, 465 U.S. at 614 (whether a compelled act of production is incriminating is a question of fact). In conducting this inquiry, the district court should be guided, as the Supreme Court counseled in *Hoffman v. United States*, 341 U.S. at 487, by its particular perceptions of the specific and unique facts of the case.

d. *The Upshot of Immunity*

A grant of statutory immunity under 18 U.S.C. §§ 6002, 6003, extends as far as the Fifth Amendment privilege it supplants. It "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege," and is "coextensive" with the Fifth Amendment's protections. *Kastigar*, 406 U.S. at 462. Since the district court erred in assessing the testimonial value of Hubbell's document production, it conducted its inquiry into the

effect of Hubbell's statutory immunity against a faulty backdrop. On remand, the court should assess the impact of the immunity order in light of its new fact findings with respect to the government's prior knowledge and the quantum of information it extracted from "the state of mind, memory, perception, or cognition of the witness." *Braswell*, 487 U.S. at 126 (Kennedy, J., dissenting). Although this inquiry will be fact-intensive, the district court should bear in mind *Kastigar*'s teaching that "a grant of immunity must afford protection commensurate with that afforded by the privilege, [although] it need not be broader." 406 U.S. at 453. The precise contours of Hubbell's Fifth Amendment rights, therefore, will be dispositive.

Intervening in this case, the United States, acting through the Attorney General, has proffered a particular reading of the Fifth Amendment's intersection with compelled production which we believe merits some discussion. Like the Independent Counsel, the United States draws a sharp distinction between the testimonial components of the act of production and the contents of those documents, essentially ruling out the possibility that the prohibition on the direct or indirect use of a party's compelled testimony could extend to reach the contents of the documents he turns over. Instead, it invites the court to compare what the government learns from the act of production with what it would know if the documents in question just appeared on its doorstep. That intellectual exercise, it argues, separates the information conveyed through the act of production with what could be deciphered from the records themselves. *See* Intervenor's Br. at 42; Dissent at 11. Since *Kastigar* instructs that the government can introduce the fruits of immunized testimony provided that it can meet "the heavy burden of proving that all of the evidence it proposes to use was derived

from legitimate independent sources," 406 U.S. at 461-62, the documents themselves can serve as that independent source of the information communicated by their production. Provided that the government does not mention the mechanics through which it obtained those documents, and that the documents are sufficiently self-explanatory and self-referential to establish their own nexus with the defendant, the government would be free to use the subpoenaed documents in making its case against the defendant.[87] We disagree.

Although the Fisher Court observed that "[t]he 'implicit authentication' rationale appears to be the prevailing justification for the Fifth Amendment's application to documentary subpoenas," 425 U.S. at 412 n.12, the Court explicitly and repeatedly acknowledged that the act of production also communicates existence and possession. *See id.* at 412; *Doe I*, 465 U.S. at 613; *Doe II*, 487 U.S. at 209; *Braswell*, 487 U.S. at 103. The analytic tool offered by the United States, however, reads both of these testimonial components out of existence. While the government may be able to establish the authenticity of the documents independently, whether in terms of their own self-reference or the testimony of a witness familiar with them, the magical appearance of the documents obviates the need for prior knowledge that the documents actually exist. Yet "*Kastigar* does not prohibit simply 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled

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[37] The Independent Counsel has made a similar argument, claiming that it has not and will not trample Hubbell's Fifth Amendment rights because it has no need to introduce Hubbell's actual documents at trial. Accordingly, the Independent Counsel asserts that it can obviate Hubbell's testimony as to the existence, possession, control, and authenticity of the subpoenaed documents. *See* Appellant's Br. at 12 ("the government has made no use of Mr. Hubbell's act of production in the course of developing the charges in the indictment.").

testimony. It prohibits '*any* use, direct or indirect." *United States v. North*, 910 F.2d 843, 861 (D.C. Cir. 1990). Once the documents appear and are examined, such that their existence enters the consciousness of the prosecutor, the United States has offered no means through which the government can establish that its evidence "is not directly or *indirectly* derived from such testimony" as to their existence. *United States v. North*, 920 F.2d 940, 946 (D.C. Cir. 1990) (emphasis in original).

The intellectual exercise suggested by the Justice Department and embraced by our dissenting colleague, *see* Dissent at 11, essentially eviscerates the act of production doctrine, as well as the Fifth Amendment protection it secures. To offer a counter-hypothetical, assume that the government grants immunity to a murder suspect, compelling him to incriminate himself verbally. Under compulsion, the accused admits that he stabbed the victim, and that he buried the murder weapon in a particular place that would not have been discovered through any alternative line of government investigation. When the police go to this remote location, they find a knife. Forensic testing reveals it not only to be the murder weapon, but also to contain blood stains and a set of fingerprints that match our suspect's. Would we allow a prosecution to be based on the incriminating knife, under our colleague's "manna from heaven" scenario, by assuming that it miraculously appeared in the district attorney's office? Could it be used as evidence so long as no-one testified as to how they learned of its whereabouts? Once the accused has already directed the government to the knife, should we limit his Fifth Amendment privilege by hypothesizing after the fact—as an intellectual exercise—that the knife could have been linked to the accused because of the blood or fingerprints on it, or because the prosecutor conceivably could have received an anonymous

report describing the location of the weapon? Could the prosecutor, consistent with the Fifth Amendment, bring charges based upon any independent linkage between the weapon and the accused that it can divine after the fact? The questions answer themselves. They also rebut the theory of the act of production doctrine proffered by the Justice Department and the dissent. Since the Self-Incrimination Clause has always been understood to refer to testimony in all of its forms, whether communicated by voice or through physical acts, *see Doe II*, 487 U.S. at 209-10 n.8 ("Petitioner has articulated no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements."); *Muniz*, 496 U.S. at 595 n.9 (definition of testimonial communication "applies to both verbal and nonverbal conduct"), the protection it accords to verbal communications must extend to the testimony conveyed through a compelled act of production.[38]

Now suppose a variation of our hypothetical, in which the police discover a victim's body in the basement of a large apartment building, and an autopsy establishes stabbing to be the cause of death. Lacking any clues, a grand jury issues a subpoena to every resident in the building, asking each to produce "all knives and other forms of cutlery that are now, or in the preceding month have been, in your possession or control." The residents object

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[38] Our dissenting colleague recognizes that the weapon is the tainted fruit of immunized oral testimony, *see* Dissent at 11, the inevitable conclusion under settled law that we constructed our hypothetical to reflect. The taint remains, however, regardless of whether the knife can be independently linked back to the accused by some stretch of the imagination. The dissent's *post hoc* "manna from heaven" scenario cannot purge it. Where the government makes the same use of compelled document production, depending on the facts and circumstances of the particular case, those documents can be equally tainted.

en masse, asserting *inter alia* their Fifth Amendment privilege against self-incrimination. After the prosecutor obtains an order compelling production and granting immunity to the maximum extent allowed by law, the residents comply with the subpoena. Among the recovered knives, the police discover the murder weapon. The prosecutor indicts its owner for murder. The defendant moves to dismiss the indictment, claiming that his immunized subpoena response testified as to the existence, his possession, and the authenticity of the knife he produced. Having handed the government the murder weapon, and provided the explicit link between it and himself, can the accused nevertheless be prosecuted consistent with the Fifth Amendment provided that the government finds some independent way to link him with the knife? If our protagonist has once again left behind fingerprints and traces of his blood, could they be used as evidence, together with the knife, so long as no one testified as to the means of recovery? In the scenario we paint, where the government had no evidentiary knowledge independent of that derived, directly and indirectly, from testimony communicated through compelled production, *Fisher*, *Doe I*, *Doe II*, *Kastigar* and *Braswell* clearly repudiate any attempt to do so. They collectively teach that the scope of the Fifth Amendment's protection cannot be measured by merely imagining that our knife appeared, like manna from heaven, in the grand jury room.

In a case such as the present one, in which the government's knowledge of the existence or possession of the extensive documentation sought via subpoena appears scant at best, the United States' hypothetical about finding the papers on its doorstep fails to capture the true nature of the Fifth Amendment's protection against the government probing the mind of an accused in order to ascertain evidence it can use to convict him. Where the testimonial

value of document production is high, and the government obtains a large quantum of information directly from the witness' mental faculties, the government labors under "a heavy burden of proving that all evidence it seeks to introduce is untainted by the immunized act of production." *In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir. 1986) (internal citations omitted). If the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence, let alone their possession by the subpoenaed party, and cannot prove knowledge of their existence through any independent means, *Kastigar* forbids the derivative use of the information contained therein against the immunized party. *See* 406 U.S. at 453 ("Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, . . . prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."). Accordingly, should the Independent Counsel prove unable to meet the requisite evidentiary burden, the contents of those documents will be inadmissible. *See Sealed Case*, 791 F.2d at 182 ("Thus, if in fact appellee's privilege in the act of production cannot be protected without excluding the contents of the tapes (a point on which we express no opinion) the District Court has the authority to prevent the government from referring to or introducing those contents.").

"The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation." *Doe I*, 465 U.S. at 616. Unless the Independent Counsel can establish its knowledge of the existence and possession of the documents sought in the subpoena with greater detail and particularity, it will have

to live with the consequences of its decision to compel production.

III. Conclusion

For the reasons above, we vacate the district court's judgment and remand for further proceedings in light of this decision.

So ordered.

Wald, *Circuit Judge*, concurring in Part I: I believe that a reasonable construction of the original mandate shows that it is "demonstrably related" to the tax evasion and asset concealment prosecutions in dispute here. That, however, is only because, as the panel opinion makes clear, at least some of the consulting monies Hubbell received in the years 1994-1997 may have been tainted as hush money. "The timing, sources, and extent of the payments make the belief that they were hush money reasonable." Panel Opinion ("Panel Op.") at 20. Thus, manipulation of all monies received during that period may have been related to the concealment of any tainted money—money, that is, received in turn for obstructing the Independent Counsel's Whitewater investigation. Panel Op. at 15-18. In the face of these circumstances, I disagree with the dissent's conclusion that the Independent Counsel's failure to bring an indictment on the hush money allegations, either first or contemporaneous with the tax violations, means that no "credible evidence" of any wrongdoing exists. Dissenting Opinion ("Diss. Op.") at 16-17.

The simple fact that no prior or simultaneous indictment for obstruction was brought down specifically alleging that monies were received as a *quid pro quo* for noncooperation in the main Whitewater matter does not compel a conclusion that the tax evasion and asset concealment charges are not related to the original subject matter. It would, in my view, be unreasonable to require the Independent Counsel to bring authorized prosecutions in any special order or sequence provided that they are undertaken and continued only so long as the "relatedness" requirement remains satisfied. I believe such a standard may be inferable from the panel opinion, Panel Op. at 18, but I wish to make clear here my own view that at the point that the Independent Counsel is no

longer diligently pursuing his investigation of the main allegation that money was channeled to Hubbell for non-cooperation or misleading testimony, with a reasonable expectation that it will prove fruitful, the other ancillary claims of manipulation or failure to report taxes cease to be "demonstrably related" to the original mandate. It is not enough that the Independent Counsel could at one time state a reasonable belief that the underlying obstruction allegations were true. In my view, the underlying investigation into the hush money charge must have been ongoing, and there must have been credible evidence that the underlying offense did indeed occur at the time the ancillary indictment was filed. To the extent that prosecution for the obstruction offense was not practicable at the time of the tax indictments, whether because the main investigation had yet to be completed, or because the Independent Counsel believed that evidentiary problems limited the prospects of obtaining a conviction on the obstruction offense at that moment, the Independent Counsel would still have jurisdiction over the ancillary charges, provided that credible evidence remained to substantiate its belief that the obstruction crime had been committed. However, if at some point during the investigation it becomes apparent that this belief is unfounded, then at that time the ancillary counts should be passed over to the Justice Department to screen and, if appropriate, to prosecute. That does not, however, appear to be the case here—we were assured at oral argument by the Independent Counsel himself that the main hush money investigation was not closed, and if there is any reason to believe that it is a dead letter at the time the indictment for ancillary tax matters was brought (or even when it is reinstated on remand here), then a hearing (*in camera* if necessary) by the district judge on the issue would be appropriate. But assuming, as we must on the

record before us, that the principal investigation into possible obstruction was alive at the time the ancilliary tax indictments were brought and remains so, I cannot but conclude that the tax indictments were related to the main endeavor for the reasons set out in the panel opinion.[1] Panel Op. at 15-18.

Finally, while I do believe that some deference is due the Special Division's interpretation of these prosecutions as related to the original one, I would not find it necessary under the facts here to decide if the appropriate level of deference is substantial, Panel Op. at 7, or only due

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[1] Although the dissent challenges the notion that these tax evasion indictments would have been proper even if there had been a simultaneous prosecution for taking hush money, *but see* Oral Arg. Tr. at 41, 43-44 (defense counsel endorsing simultaneous prosecution), I do not see how that argument can be maintained. The original mandate, as required by 28 U.S.C. § 593(b)(3), granted the Independent Counsel jurisdiction to investigate and prosecute obstruction of its primary investigation. When inquiring into whether Hubbell had received hush money in return for noncooperation, the Independent Counsel had jurisdiction to investigate the likely concealment of any such payments. As tax evasion constitutes a logical part of any effort to evade the detection of illicit funds, the Independent Counsel legitimately focused his attention in that direction. Whatever Hubbell's subjective motivation for not reporting income might have been, tax evasion is an inherently concealing activity. To the extent that Hubbell failed to report consulting fees alleged to be hush money, he obstructed the obstruction investigation. Provided that the underlying investigation was still actively being pursued, the Independent Counsel accordingly had jurisdiction to investigate and prosecute Hubbell's acts of concealment.

The dissent suggests, however, that this court, in order to assure that the Independent Counsel's investigation had actually unearthed evidence of obstruction, should have taken up the Independent Counsel's proffer to view evidence relating to the "hush money" allegations *in camera*. Diss. Op. at 17. Aside from the fact that one of the defense counsel explicitly denounced such a course at oral argument, *see* Oral Arg. Tr. at 41, that inquiry would be more appropriately conducted by the district court when adjudicating a motion to dismiss the indictment for unrelatedness on this ground.

deference. I do not find the agency analogy particularly persuasive, but on the other hand I believe that the responsibilities of the Special Division under the statute to define the Independent Counsel's jurisdiction initially, and subsequently to assess requests for the referral or related matters, strongly militate toward some deference; the degree of deference due will likely depend on the circumstances of each case. The extent of that deference might shift according to whether the Special Division's relatedness determination is grounded particularly on facts made known to it by the Independent Counsel or the Attorney General or on a legal or conceptual conclusion that the offenses or persons are sufficiently related to the original mandate. At any rate, I think the relatedness requirement is satisfied here under either standard of deference.

TATEL, *Circuit Judge*, dissenting from Part I:

This court today concludes that the indictment of Webster Hubbell for failing to pay taxes on income earned in Washington, D.C., in 1994 "arises out of" or "relates to" the Independent Counsel's investigation of various Arkansas land transactions in the mid-1980s known as Whitewater. Because this result expands independent counsel authority at the expense of the Executive Branch, I believe it violates the constitutional principle of separation of powers. By deferring to the Special Division and by adopting virtually limitless theories of "relatedness," the court fails to police the boundaries that *Morrison v. Olson* deemed essential to the constitutionality of the independent counsel statute. *See* 487 U.S. 654 (1988). Mindful of these boundaries, which guarantee political accountability for the prosecutorial function, and of "the duty of federal courts to construe a statute in order to save it from constitutional infirmities," *id.* at 682, I would find that the tax indictment is not "demonstrably related to the factual circumstances that gave rise to the Attorney General's . . . request for the appointment of the independent counsel," *id.* at 679. I would therefore affirm the district court's order quashing the indictment.

I

Vesting the executive power in the President of the United States, the Constitution directs that "he shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. To aid in this task, Congress specifically delegated to the Attorney General and her subordinates in the Department of Justice the power to "conduct any kind of legal proceeding, civil or criminal," 28 U.S.C. § 515(a) (1994); *see id.* § 516, including the prosecution of tax crimes, *see* 28 C.F.R. § 0.70 (1998).

The Ethics in Government Act of 1978 carved a narrow exception to the Attorney General's power to enforce federal criminal law. In the wake of the "extraordinary sequence of events" of the Watergate scandal—in particular, the firing of special prosecutor Archibald Cox—Congress saw the need for "the appointment of an independent temporary special prosecutor for certain limited cases where the Department of Justice may have a conflict or interest with respect to a particular investigation." S. REP. No. 95-170, at 6, 34 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4126, 4222, 4250. Aware of the constitutional implications of creating an independent prosecutorial function outside the Executive Branch, Congress adopted an elaborate array of procedures controlling the appointment, powers, and jurisdiction of independent counsel. *See* 28 U.S.C. §§ 592-596. Independent counsel may be removed by the Attorney General for "good cause," may perform only certain limited duties and may act only within the scope of prosecutorial jurisdiction ceded by the Attorney General. *See* S. REP. No. 95-170, at 56, 1978 U.S.C.C.A.N. at 4272 ("The prosecutorial jurisdiction of the special prosecutor is one of the most important devices for the control . . . and the accountability of such a special prosecutor."). Absent expansion by the Attorney General under 28 U.S.C. § 593(c), the jurisdiction of an independent counsel is limited to matters related to the Attorney General's original request for appointment of an independent counsel under 28 U.S.C. § 592(d).

In *Morrison*, the Supreme Court found these constraints essential to the statute's constitutionality. Without them, the Court could not have characterized the independent counsel as an "inferior officer" under the Appointments Clause of the Constitution. *See* 487 U.S. at 670-77. Once an independent counsel investigates or prosecutes

matters beyond the jurisdiction ceded by the Attorney General, the independent counsel sheds his "inferior" status and becomes a "principal officer" requiring Presidential appointment and Senate confirmation. *See Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Although "the power to appoint inferior officers such as independent counsel is not in itself an 'executive' function in the constitutional sense," *Morrison*, 487 U.S. at 695, the power to appoint principal officers surely is. *See* U.S. CONST. art. II, § 2, cl. 2. For that reason, the *Morrison* Court thought it constitutionally important that "the jurisdiction of the independent counsel is defined *with reference to the facts submitted by the Attorney General*" and that "the Act [28 U.S.C. § 594(f)] requires that the counsel abide by Justice Department policy unless it is not 'possible' to do so." 487 U.S. at 696 (emphasis added). These limitations, among others, "give the Executive Branch sufficient control over the independent counsel," *id.*, and ensure that the Act does not " 'impermissibly undermine[ ]' the powers of the Executive Branch," *id.* at 695 (citation omitted). An independent counsel who exceeds the jurisdiction conferred by the Attorney General usurps the President's constitutional power to maintain control of the inherently "executive" function of law enforcement. *See id.* at 691, 694.

Morrison expressed similar constitutional concerns about the role of the Special Division of this court. The statute allows the Special Division to appoint an independent counsel only after the Attorney General makes a preliminary investigation, determines that further investigation is warranted, prescribes a subject matter for investigation and potential prosecution, and "applies" to the Special Division for an appointment. *See* 28 U.S.C. §§ 592(c)-(d), 593(b). In defining an independent coun-

sel's prosecutorial jurisdiction, the Special Division has only one function:

> [to] assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes . . . that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

Id. § 593(b)(3). Describing the Special Division's power to define jurisdiction as "incidential" to its power to appoint, *Morrison* made clear that the Special Division's authority is quite limited:

> [Congress] may vest the power to define the scope of the office in the [Special Division] as an incident to the appointment of the officer pursuant to the Appointments Clause. That said, we do not think that Congress may give the Division *unlimited* discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be *demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.*

487 U.S. at 679 (second emphasis added). To be sure, the statute also provides that the Special Division may, upon a request by an independent counsel, "refer to the independent counsel matters related to the independent

counsel's prosecutorial jurisdiction." 28 U.S.C. § 594(e). But *Morrison* left no doubt that referrals may not expand the original scope of an independent counsel's jurisdiction. *See* 487 U.S. at 680 n.18. Consistent with the separation of powers principle, only the Attorney General may expand an independent counsel's prosecutorial jurisdiction. *See* 28 U.S.C. § 593(c).

Thus, the Attorney General's "initial suggestion of jurisdiction." Majority Opinion ("Maj. Op.") at 8—or more precisely, as *Morrison* put it, "the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel," 487 U.S. at 679—serves as the ultimate baseline for assessing the legality of any definition of jurisdiction by the Special Division as well as any exercise of authority by an independent counsel. Constitutionally required, this baseline reconciles the principle of separation of powers with the vesting of prosecutorial authority in an official independent of the Executive Branch. *See id.*

II

In her June 30, 1994 application to the Special Division, the Attorney General prescribed the subject matter of the Independent Counsel's jurisdiction as follows:

> whether any individuals or entities have committed a violation of any federal criminal law, . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

Application for Appointment of Independent Counsel, *In re Madison Guar. Sav. & Loan Ass'n* (June 30, 1994).

The application also authorized prosecution of any conduct obstructing the investigation of this core subject matter. *See id.* Exercising its power under 28 U.S.C. § 593 (b)(1), the Special Division on August 1, 1994 appointed Kenneth W. Starr as independent counsel and granted him prosecutorial jurisdiction over matters set forth in the Attorney General's application. *See* Maj. Op. at 3-4 (describing the Special Division's original grant of jurisdiction). Responding to subsequent requests from the Independent Counsel, the Special Division twice exercised its referral power under 28 U.S.C. § 594(e). *See* Maj. Op. at 4-5 (describing the September 1, 1994 and January 6, 1998 referrals).

The second referral arose from an application in which the Independent Counsel stated:

> In the course of its investigation, this Office received information regarding payments to Mr. Hubbell from individuals and entities associated with the Clinton Administration. These payments were made starting in 1994, when Mr. Hubbell was publicly known to be under criminal investigation. This Office initiated a preliminary investigation into whether these payments might be related to Mr. Hubbell's unwillingness to cooperate fully with the investigation, as his plea agreement obligated him to do. The grand jury has heard evidence related to the payments, including evidence that Mr. Hubbell may have committed fraud and tax crimes in connection with them.

Application for Order of Referral, *In re Madison Guar. Sav. & Loan Ass'n* (Dec. 31, 1997), at 3-4. In response, the Special Division's referral authorized investigation and prosecution of crimes, including tax offenses, associated with Hubbell's income since 1994, as well as other crimes

such as obstruction of justice and perjury "related to payments that Mr. Hubbell has received from various individuals and entities" since 1994. Order Granting Application for Order of Referral, *In re Madison Guar. Sav. & Loan Ass'n* (Spec. Div. D.C. Cir. Jan. 6, 1998). The Independent Counsel then brought a 10-count, 42-page indictment detailing an elaborate tax evasion scheme allegedly undertaken by Hubbell and his wife, along with their lawyer and accountant.

We now face the following question: Under sections 593(b)(3) and 594(e) of the Ethics in Government Act, does this indictment "arise out of" or "relate[] to" the original scope of the Independent Counsel's prosecutorial jurisdiction? To answer this question, we must evaluate the indictment not against the two referrals by the Special Division—those referrals could not have expanded the original scope of the Independent Counsel's jurisdiction, *see Morrison*, 487 U.S. at 680 n.18—but against the Special Division's original August 5, 1994 grant of authority. Given *Morrison*'s constitutional limitation on the Special Division's power to define independent counsel jurisdiction, *see id.* at 679, the precise question before us is this: Is the indictment of Hubbell for tax evasion "demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel"?

Before addressing this issue, this court holds that the Special Division's January 1998 referral is entitled to deference—"substantial" deference, according to Judge Williams; at least "due" deference, according to Judge Wald. Either way, I disagree.

At the outset, I think it important to clarify that, as a procedural matter, we are not directly reviewing the Special Division's referral. The statute nowhere authorizes

appeals from Special Division referrals. Courts of appeals and the Special Division play different institutional roles under the independent counsel statute. They act at different stages of the investigation, and they have different documents before them. Although the Special Division made an implicit determination of "relatedness'" in its referral, it did so in the context of a request for investigative and prosecutorial authority. That investigation has now progressed beyond mere allegations and has evolved into an indictment. Our task, like the district court's before us, is to resolve a specific dispute whose parameters have crystallized: We must decide whether the April 30, 1998 indictment, in all its concreteness and particularity, is "related to" the original scope of the Independent Counsel's prosecutorial jurisdiction. The Special Division did not resolve this question, nor could it.

In support of giving the referral deference, Judge Williams accepts the view that the Special Division "act[ed] quite like [an agency] glossing its own regulation" when it exercised its referral power. Maj. Op. at 8. However, the Special Division possesses none of the characteristics of agencies that entitle their legal judgments to judicial deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). In making "related to" determinations, the Special Division exercises no special or technical expertise that circuit and district courts lack. The Special Division has no political accountability through either executive or congressional oversight, and its members are neither appointed by the President nor confirmed by the Senate for their role. No provision of law allows for direct judicial review of its decisions. Unlike administrative agencies—and unlike even the U.S. Sentencing Commission, *see* 28 U.S.C. §§ 991(b), 994-995—the Special Division exercises no congressionally-delegated policymaking responsibilities.

This last fact alone undermines the agency analogy, for "the power authoritatively to interpret its own regulations is a component of the agency's *delegated lawmaking powers.*" *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) (emphasis added), *quoted in* Maj. Op. at 9.

Morrison left no doubt that in both form and function, the Special Division is a court, not an agency. The opinion consistently refers to the Special Division as a "court": "The court consists of three circuit court judges or justices appointed by the Chief Justice of the United States," 487 U.S. at 661 n.3; "we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court," *id.* at 676; "there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court," *id.* at 683; "once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel," *id.* at 695. Were this language not clear enough, *Morrison* explicitly held that the Special Division's functions fall within the range of powers assigned to federal courts by the Appointments Clause, *see id.* at 673-77, and by Article III, *see id.* at 677-85.

Morrison also acknowledged that the Special Division functions in a judicial capacity when exercising its referral power. Observing that "in order to decide whether to refer a matter to the counsel, the court must be able to determine whether the matter falls within the scope of the original grant," the Supreme Court said that the referral power involves "the power to *'reinterpret'* or *clarify* the original grant." *Id.* at 685 n.22 (emphasis added); *see also In re Espy*, 80 F.3d 501, 507 (Spec. Div. D.C. Cir. 1996) ("In referring a related matter, this court is interpreting, but not expanding, the independent counsel's original prosecutorial jurisdiction. . . ."). In other words,

the referral function requires the Special Division to decide a *legal question*—i.e., whether the matters contained in an independent counsel's request for referral are "related to" the original jurisdictional grant. *See id.* at 507-09; *In re Olson,* 818 F.2d 34, 47-48 (Spec. Div. D.C. Cir. 1987). Answering this question calls on the Special Division—whether explicitly (as in *Espy*) or implicitly (as in this case)—to develop and apply a theory of "relatedness" consistent with the independent counsel statute and the Constitution.

Because the Special Division's January 1998 "related to" determination amounts to a legal judgment, we owe it no deference. We typically apply de novo review to decisions of other courts (except the Supreme Court) on questions of federal law, *see Elder v. Holloway,* 510 U.S. 510, 516 (1994) (questions of law must be resolved de novo on appeal), and "[w]hen *de novo* review is compelled, no form of appellate deference is acceptable," *Salve Regina College v. Russell,* 499 U.S. 225, 238 (1991). No one contends that the Special Division, as part of the D.C. Circuit, creates binding circuit precedent through its decisions. In relation to this court, the Special Division's legal determinations resemble those of our sister circuits, whose conclusions of law we review neither directly nor deferentially.

Acknowledging that referrals could be characterized as judicial acts, Judge Williams says that referrals most closely resemble the issuance of search warrants by federal magistrates or state judges, whose determinations of probable cause, "[a]lthough made ex parte and resolving constitutional questions," are accorded " 'great deference' " under settled law. Maj. Op. at 11 (citing *Illinois v. Gates,* 462 U.S. 213, 236 (1983)). In *Gates,* however, the Supreme Court made clear that the deferential standard of appellate review applicable to search warrants stems directly from the intensely fact-bound nature of an issuing magistrate's probable-cause determination. *See* 462 U.S. at 232 ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."); *id.* at 241 ("[P]robable cause deals 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' ") (citation omitted). Unlike a magistrate, the Special Division does not "make a practical, commonsense decision" about probabilities when it considers requests for referrals. *Id.* at 238. Rather, it compares two legal documents—the independent counsel's referral request and the original grant of prosecutorial jurisdiction—and then determines whether the former is "related to" the latter within the meaning of the statute. Like a court evaluating a complaint on a motion to dismiss, the Special Division finds no facts, weighs no evidence, and makes no credibility determinations. It simply decides a question of law. Given the interpretive nature of this task, deference cannot be justified on the grounds "that the [Special Division] is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College,* 499 U.S. at 233.

It is true that a referral under the independent counsel statute presents a situation "[w]here . . . the relevant legal principle can be given meaning only through its application to the particular circumstances of a case." *Miller v. Fenton,* 474 U.S. 104, 114 (1985). But the Supreme Court has directed that in such situations a federal appellate court must retain "its primary function as an expositor of law." *Id.* De novo appellate review is particularly important where, as here, the relevant legal principle has

constitutional dimensions. *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 107 (1995) (requiring federal habeas court to review de novo whether suspect was "in custody" at time of interrogation for purposes of *Miranda*); *Miller*, 474 U.S. at 112 (requiring "independent federal determination" of the voluntariness of a confession).

I disagree that referrals will have no real function under the statute unless we defer to the Special Division. *See* Maj. Op. at 11. For one thing, the Special Division's referral authority provides independent counsel, sensitive to both the limitations on their office and the ethic of self-restraint honored by federal prosecutors, with an avenue for seeking independent and impartial confirmation of their authority. Immune from direct judicial review, a referral gives legitimacy to an independent counsel's investigation even if a federal court later determines that a specific indictment exceeds the prosecutor's jurisdiction. This legitimacy provides a level of protection against any attempt by the Attorney General to remove or by Congress to impeach an independent counsel on the grounds that he has overstepped his authority. *See* 28 U.S.C. § 596(a)(1). The referral process also empowers the Special Division to enforce the boundaries of independent counsel jurisdiction. Where the Special Division rejects a request for referral, only the most zealous and imprudent prosecutor would pursue matters covered by the rejected application. Far from existing "simply to relieve the solitude of the Independent Counsel's office," Maj. Op. at 11, the referral power thus serves important functions under the statutory scheme, constraining independent counsel when they near the limit of their authority and safeguarding their political independence if their investigative authority is challenged.

For all of these reasons, I would hold that this court owes no deference to the Special Division's "related to"

determination. In assessing the legality of this tax indictment, our review should be de novo.

III

This court's conclusion that the Independent Counsel has authority to proceed with this indictment stems from its view, flawed in my judgment, that we would "undercut [*Morrison*]" were we to construe the independent counsel statute in ways "that prevent this Independent Counsel from performing his duty in a manner reasonably approximating that of an ordinary prosecutor." Maj. Op. at 20. Insisting on affording the Independent Counsel the same "leeway," *id.* at 15, given to "every other prosecutor," *id.* at 19, the court ignores the basic premise critical to the constitutionality of the statute: Independent counsel do not and cannot have the powers of ordinary prosecutors. If they did, the office would " 'impermissibly undermine[]' the powers of the Executive Branch." *Morrison*, 487 U.S. at 695 (citation omitted). Among other constraints, it is the limited jurisdiction of independent counsel that "give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696. That an ordinary federal prosecutor might have authority to indict Hubbell for tax evasion therefore tells us nothing about whether this Independent Counsel—constrained by the statute and the separation of powers principle—may bring the same indictment. Nor do we learn anything from the authority possessed by the Watergate Special Prosecutor, *see* Maj. Op. at 17, for the full scope of his authority flowed directly from the Attorney General, thus presenting no separation of powers concerns.

Reviewing the record de novo, I would find that the indictment of Hubbell for tax evasion was not "demon-

strably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel." *Morrison*, 487 U.S. at 679. Hubbell's alleged failure to pay taxes on fees for work from 1994 to 1997 in Washington, D.C., is *unrelated* to whether, almost a decade earlier in Little Rock, Arkansas, "any individuals or entities have committed a violation of any federal criminal law . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationship with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." Application for Appointment of Independent Counsel. The Attorney General who prescribed the original subject matter for investigation agrees. According to her amicus brief:

> [A]n offense cannot be 'related' within the meaning of [the statute] solely because an independent counsel discovers it during a legitimate phase of his investigation. That interpretation of the statute would allow an independent counsel to prosecute offenses that bear no relationship to his original grant of jurisdiction.

Amicus Br. for United States at 32. "The current prosecution," the Attorney General concludes, "does not fall within [the Independent Counsel's] authority directly to investigate the Whitewater/Madison Guaranty matter." *Id.* at 34.

In reaching the opposite conclusion, this court rests its finding of "relatedness" on two assumptions: that the fees Hubbell received were payments for his silence, and that his failure to pay taxes on them had an obstructive effect on the Whitewater investigation. In my view, both assumptions are flawed, and each *independently* undermines

the statutory and constitutional constraints on independent counsel jurisdiction.

Assumption of obstructive effect

I begin with the court's second assumption, i.e., that Hubbell's failure to pay taxes on alleged hush money had an obstructive effect on the Whitewater investigation. Not limited to Hubbell's failure to pay taxes on alleged hush money, the indictment's sheer breadth belies the court's obstruction theory. The indictment charges Hubbell with non-payment of taxes on income from a book contract with HarpersCollins Publishers, early withdrawals from an IRA account and pension plan, and sales of his home and a Little Rock warehouse. In addition, by charging Hubbell's lawyer and accountant for aiding and abetting tax evasion, the Independent Counsel did not limit the indictment to individuals who could have obstructed the Whitewater investigation.

According to my colleagues, "*any* criminal conduct that could hide the hush money . . . tends to impede investigation and prosecution of the matter being hushed up." Maj. Op. at 16. "The less disclosure of the payment," they say, "the less chance that they and their nature will come to light. . . ." *Id.* But even assuming that Hubbell's "consulting" fees were hush money (an assumption not supported by this record, *see infra* at 16-17), the facts of this case provide no support for the court's concealment theory. In his 1994 tax return, Hubbell actually *disclosed* $376,075 in "consulting" income that the Independent Counsel suspects is hush money. This amount included $100,000 from Hong Kong China Limited and $62,775 from Revlon, the two sources the court highlights, *see* Maj. Op. at 4-5 & n.1, en route to finding that "[t]he timing, sources, and extent of the payments make the belief that they were hush money reasonable," *id.* at 20. Acknowledging these disclosures, the court rests its find-

ing of concealment on the fact that Hubbell did not report an additional $77,000 in "consulting" fees in 1994. *See* Maj. Op. at 16. But since Hubbell disclosed the lion's share of the alleged hush money on his 1994 tax return—including the very payments that the Independent Counsel and my colleagues believe have the strongest whiff of obstruction—it seems odd to think that Hubbell chose not to disclose the remaining fraction in order to conceal hush money payments. In any case, nothing in the record (beyond the non-disclosure itself) suggests that the $77,000 was hush money. *See infra* at 16-17. We thus lack any basis for suspecting that Hubbell's non-disclosure reflected a concerted effort to hide hush money instead of a tendency (generally apparent from the indictment) to ignore the internal revenue laws.

The court's concealment theory makes much more sense in a case like *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cited in* Maj. Op. 17. There the defendants directly obstructed the Watergate investigation by lying under oath to the Special Prosecutor, a grand jury, and a Senate committee about hush money payments they had made to the Watergate burglars. *See* 559 F.2d at 59; *see also United States v. Blackley*, No. 98-3036, slip op. at 9 (D.C. Cir. Jan. 26, 1999) (upholding conviction of high-ranking Department of Agriculture official who concealed payments he received from individuals regulated by the Department by failing to disclose those payments on an official financial disclosure form whose very purpose was "to bring suspicious influences to the surface").

The court next adopts the Independent Counsel's argument that Hubbell's failure to pay taxes "enhanc[ed] the financial or economic effect of the hush money payments. . . . And that contributes to the obstruction of the investigation." Oral Arg. Tr. at 16; *see* Maj. Op. at 16

("[T]he more value Hubbell can squeeze from hush money . . . , the more chance it will succeed in preventing his cooperation."). But even if we again assume the payments to be hush money, their obstructive effect ended upon Hubbell's receipt; his subsequent non-payment of taxes bought his benefactors no further silence. The Independent Counsel never alleged that Hubbell's benefactors somehow discounted the value of the alleged hush money by the probability that he would not pay taxes. Indeed, who could have foreseen the bizarre nature of the tax evasion scheme detailed in the indictment? Who would have expected that, having reported $376,075 of his $450,010 in "consulting" income on his 1994 tax return, Hubbell would then, as with his other income, not pay taxes on it?

The court's economic enhancement theory permits virtually unlimited expansion of the Independent Counsel's jurisdiction. Had Hubbell used the alleged hush money for profitable but illegal gambling or insider trading, for example, this theory would allow the Independent Counsel to indict him for these crimes simply because they increased the value of the money. Surely this result stretches the concept of "relatedness" beyond its statutory and constitutional breaking point.

Together, the concealment and economic enhancement theories enable the Independent Counsel to comb through all of the Hubbell's investments and expenditures—including, as the indictment reveals, his purchase of clothes, groceries, and laundry services—until discovering some illegality on which to indict him. By adopting these theories, the court converts the Office of the Independent Counsel from a device for investigating a specific "subject matter," 28 U.S.C. § 593(b)(3), into a tool for prosecuting a specific individual. As the district court observed, "[t]he Madison-Whitewater matters that were the sub-

ject of the Original Grant and the tax matters that are the subject of this case have nothing in common—nothing at least, that appears on this record—except Webster Hubbell." *United States v. Hubbell,* 11 F.Supp.2d 25, 32 (D.D.C. 1998). This is precisely the result Justice Scalia, dissenting in *Morrison,* most feared:

> [T]he most dangerous power of the prosecutor [is] that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.

487 U.S. at 728 (Scalia, J., dissenting) (quoting then-Attorney General Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (April 1, 1940)).

Deeply corrosive to the statutory and constitutional limits on independent counsel jurisdiction, the court's concealment and economic enhancement theories cannot justify a finding of "relatedness" in this case. In my view, this conclusion in and of itself is enough to sustain the district court's quashing of the indictment. But because the court's contrary holding also rests on the assumption that Hubbell's fees were hush money, I set forth my views on this issue as well.

Assumption that Hubbell's fees were hush money

Even if the court's concealment and economic enhancement theories had merit, they have no applicability to this

case for one simple reason: Although both depend entirely upon Hubbell's involvement in an underlying crime of obstruction, this record contains no credible evidence of such a crime.

In his brief, the Independent Counsel refers to the "possibility" that Hubbell "*might* have accepted money as an inducement to obstruct the Madison investigation." OIC Br. at 20 (emphasis added); *see also id.* (stating that "large payments" on which Hubbell did not pay taxes "*may be* related to his non-cooperation with respect to Whitewater and Madison-related matters") (emphasis added). Yet, the Independent Counsel has chosen not to indict Hubbell for accepting hush money payments or anyone else for making them. Although I agree with my colleagues that the Independent Counsel need not formally charge Hubbell for accepting hush money in order to indict him for tax evasion, I disagree that we may sustain the tax indictment simply because the Independent Counsel is "diligently pursuing his investigation of the main allegation that [hush] money was channeled to Hubbell," Wald Op. at 1. Without credible evidence that Hubbell accepted hush money, there can be no "*demontrabl*[*e*] relat[ionship]" between Hubbell's tax crimes and the Independent Counsel's original grant of jurisdiction. *Morrison,* 487 U.S. at 679 (emphasis added).

At oral argument, the Independent Counsel conceded that "we right now, as a matter of public record, don't know" that Hubbell's "consulting" income was hush money. Oral Arg. Tr. at 13. Notwithstanding this uncertainty, my colleagues have seen no need either to accept the Independent Counsel's offer to submit evidence *in camera*—evidence that he claims shows that the commission of that crime was more likely than not, *see id.*—or to remand to the district court to consider such evidence. Instead, they accede to his request that we not "indulge in the assumption that there is no evidence of obstruc-

tion," *id.*, shoring up the Indcpendent Counsel's innuendo with non-record evidence plus a little innuendo of their own, *see* Maj. Op. at 4-5 n.1.

The record in this case is quite unlike the record in *United States v. Haldeman,* where this court upheld the convictions of H.R. Haldeman, John Ehrlichman, and John Mitchell for "conceal[ing] a cover-up" in the Watergate affair. Maj. Op. at 17 (emphasis omitted). In that case, the allegations that the defendants paid hush money to the Watergate burglars and then lied about it under oath were supported by vast amounts of credible evidence, primarily consisting of direct testimony and tape recordings of key conversations among the co-conspirators. *See Haldeman,* 559 F.2d at 55-59 (describing defendants' "commitments" to pay the burglars hush money and detailing defendants' extensive conspiracy to raise, transfer, deliver, and conceal the hush money payments).

My colleagues say that independent counsel should enjoy the same discretion that U.S. Attorneys have to charge defendants with "cover-up" crimes without charging them for the underlying crimes. *See* Maj. Op. at 18 (citing Department of Justice guidelines). But as I have pointed out, Hubbell's tax offenses cannot plausibly be labeled "cover-up" crimes. *See supra* at 13-14. Moreover, the court's analogy is constitutionally flawed. It ignores the critical fact that U.S. Attorneys, unlike independent counsel, never need to prove that a particular crime falls within the jurisdiction ceded to them. They have authority to follow a trail of criminality and (subject to Justice Department procedures described below) to convert an investigation of real estate fraud into a prosecution of tax crimes. If the constitutional separation of powers precludes anything, it precludes the extension of such vast discretion to independent prosecutors who lack "the unifying influence of the Justice Department" and "the perspective that multiple responsibilities provide." 487 U.S. at 732 (Scalia, J., dissenting).

IV

Finally, in addition to adopting virtually limitless theories of "relatedness" and assuming that Hubbell accepted hush money, my colleagues discount the constitutionally significant requirement that independent counsel "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws" unless "to do so would be inconsistent with the purposes of the [Act]." 28 U.S.C. § 594(f)(1); *see Morrison,* 487 U.S. at 696. Under Department of Justice Tax Division Directive 86-59, all federal prosecutors, expressly including independent counsel, must follow certain procedures before "seeking to expand nontax grand jury investigations to include inquiry into possible federal criminal tax violations." *Authority to Approve Grand Jury Expansion Requests to Include Federal Criminal Tax Violations,* 5 DEP'T OF JUSTICE MANUAL 6-227, 6-227 (1995-1 Supp.). This directive prevents prosecutors from targeting an individual for tax crimes when their investigative authority extends only to a non-tax criminal investigation. Specifically, it requires all prosecutors to submit written requests to officials at the Internal Revenue Service and Tax Division containing pertinent information relating to the alleged federal tax offenses." *Id.* at 6-228. Approval requires an IRS referral certifying that "there is reason to believe that federal criminal tax violations have been committed." *Id.* at 6-229. In addition, prosecutors must conduct grand jury proceedings "in sufficient time to allow the results of the tax segment of the grand jury proceedings to be evaluated by the Internal Revenue Service and the Tax Division before undertaking to initiate criminal proceedings." *Id.*

In this case, I see no reason why the Independent Counsel could not have complied with Tax Directive 86-59. My colleagues are willing to *assume* that requiring such compliance would be "inconsistent with the purposes" of the independent counsel statute, 28 U.S.C. § 594(f)(1), attributing to the IRS—merely because it is an executive branch agency—a conflict of interest so severe that it cannot make a reasoned judgment as to whether Hubbell should be prosecuted for tax crimes. They apparently view compliance with Justice Department procedures as categorically "inconsistent with the purposes" of the statute whenever such procedures submit federal prosecutors to oversight by executive branch agencies. Surely section 594(f)(1) is not so toothless. This provision, which at the time of *Morrison* required compliance "except where not possible," 28 U.S.C. § 594(f) (Supp. V 1983) (amended 1995), was viewed by the Supreme Court as one of the statutory safeguards ensuring that the Executive Branch has enough control over independent counsel to accomplish its constitutionally assigned functions. *See Morrison*, 487 U.S. at 696.

V

In sum, I believe that the court's finding of "relatedness"—premised on deference to the Special Division, unbounded theories of obstruction of justice, and unsubstantiated suspicions of illegality—undermines the constitutional constraints on independent counsel jurisdiction. *Morrison* endowed the statute's jurisdictional controls with constitutional significance because it recognized that the absence of such controls would enable independent counsel to usurp executive power. This case provides reason to worry that the Office of Independent Counsel indeed functions as a "mini-Executive . . . operating in an area where so little is law and so much is discretion."

Morrison, 487 U.S. at 732 (Scalia, J., dissenting). Because the constitutional separation of powers demands greater vigilance, I believe that this Independent Counsel has exceeded his jurisdiction.

My conclusion would not impair the Ethics in Government Act's "central purpose . . . [of] permit[ting] the effective investigation and prosecution of high level government and campaign officials," *United States v. Wilson*, 26 F.3d 142, 148 (D.C. Cir. 1994), *quoted in* Maj. Op. at 15. This Independent Counsel's original grant gives him all the authority he needs to prosecute Hubbell and others for obstruction of justice if he has evidence that Hubbell received hush money. *See* 28 U.S.C. § 593(b)(3). If he wants to prosecute Hubbell for self-standing tax offenses discovered in the course of his investigation, he can ask the Attorney General to expand his investigative jurisdiction, *see id.* § 593(c), and then set in motion Justice Department procedures for prosecuting criminal tax violations, *see supra* at 18. As the subsequent indictment of Hubbell illustrates, *see* Neil A. Lewis, *Starr Indicts Hubbell a 3d Time*, N.Y. TIMES, Nov. 14, 1998, at A1, the Independent Counsel, short of pursuing this tax indictment, retains vast investigative and prosecutorial authority under the Special Division's January 1988 referral.

I respectfully dissent.

WILLIAMS, *Circuit Judge*, dissenting from Part II: The commentator who predicted that *Fisher* and *Doe* would "inevitably lead" to "metaphysical speculation" was apparently all too prescient. See Samuel A. Alito, Jr., "Documents and the Privilege Against Self-Incrimination," 48 U. Pitt. L. Rev. 27, 59 (1986). The majority opinion supplies some such speculation and demands more from the district court on remand. I would limit the district court's inquiry about the subpoenaed documents to verifying that the Independent Counsel, in securing Hubbell's indictment, has only used information that he would have had if the documents had appeared in his office, unsolicited and without explanation.

* * * *

It is clear that a prosecutor who has obtained personal documents by subpoena may not, without violating either the Fifth Amendment or a use immunity of equivalent scope granted under 28 U.S.C. § 6002, use against the subpoenaed person any testimonial, incriminating information that is communicated by that person's "act of production" of the documents. See *Doe v. United States*, 487 U.S. 201, 209 (1988) ("*Doe II*"). The Supreme Court identified three species of information possibly communicated by such an act of production—possession, authentication and existence. See *id.*

Here the only interesting issue is the "existence" theory; possession and authentication seem properly outside the case. Hubbell's prior possession is irrelevant if, as appears to be the case, the Independent Counsel relied on the documents only for the information that they contain, and thus had no occasion to rely on Hubbell's act of production, or anything else, for evidence that Hubbell at one time had "possessed" them. Nor does it appear that he used the production for authentication; he never sought

to show the grand jury that Hubbell, by delivering the documents in response to the subpoena, had identified them as being ones that matched the descriptive language of the subpoena.

Thus we are left with "existence." From the truism that the Independent Counsel could not use the contents of the documents unless they (at some time) existed, and unless he learned of that existence, the majority leaps to the proposition that the Independent Counsel's awareness of their existence stems from *a testimonial aspect* of Hubbell's act of production. Accordingly, it says, the Independent Counsel may use the information in the documents if but only if he can show that he possessed, *before* securing the subpoena, a knowledge of the documents' existence sufficiently detailed that his later knowledge, *after* their delivery, was a "foregone conclusion."

But not all aspects of the act of production are testimonial. Where an item of information that the prosecutor receives from a document delivery flows from a non-testimonial aspect, he does not depend on any testimonial aspect. Information as to the existence of the pieces of paper turned over by a subpoenaed party can always be traced to non-testimonial information. I elaborate below.

* * * *

"*Testimonial.*" Before the *Fisher Court* introduced the "foregone conclusion" discussion on which the majority is so focused—and which I discuss below—it observed that the whole issue of whether something is "testimonial" depends on the facts and circumstances. *Fisher v. United States*, 425 U.S. 391, 410 (1976). But what facts and circumstances are relevant?

One possibility might be that all actions from which we can glean information are considered testimonial communications for purposes of Fifth Amendment analysis.

But the precedents upon which *Fisher* relied in more or less rejecting the view of *Boyd v. United States*, 116 U.S. 616 (1886), that the Fifth Amendment protects the contents of subpoenaed documents, appear to rule this out. Those cases involve the government forcing a person to try on a blouse worn by the perpetrator to establish whether it fit the defendant, *Holt v. United States*, 218 U.S. 245 (1910), or to give blood samples, *Schmerber v. California*, 384 U.S. 757, 764-65 (1966), voice samples, *United States v. Wade*, 388 U.S. 218, 222-23 (1967), or handwriting samples, *Gilbert v. California*, 388 U.S. 263, 266-67 (1967). They do not rely on anything like the "foregone conclusion" rationale; instead, they find that such acts are not testimonial because they fit into the category of "compulsion which makes a suspect or accused the source of 'real or physical evidence.'" *Schmerber*, 384 U.S. at 764.

Nor can these cases be recharacterized as ones where the prosecutor's grasp of the information obtained was a foregone conclusion. Of course it is true that, for example, it is typically not much to admit that one can speak. But in giving a voice sample, one also admits that one's voice has various characteristic idiosyncrasies—a non-obvious and incriminating fact that the law allows the prosecutor to secure by compulsion. The prosecutor's and jury's access to that information is as dependent on the speaker's compelled implicit admission of ability to speak as their access to the information on documents is dependent on the subpoenaed party's implicit admission of the documents' existence.

One can, of course, discern a communicative element in the giving of a voice sample: a person commanded to speak implicitly says, "This is the way I sound when I speak." But that information adds nothing to what a jury

learns from its own ears (or from a properly authenticated tape, if that is the way it is done, see, e.g., *United States v. Dionisio*, 410 U.S. 1 (1973) (grand jury subpoena requiring suspects to read transcripts into a recording device is consistent with Fifth Amendment)). Similarly, a person giving a blood sample implicitly says, "This is my blood." Though there is implicit communication, the prosecutor need not rely on it, so long as he has the blood and a witness to the blood-giving itself.

"*Foregone Conclusion.*" The most confusing part o *Fisher* is the language that the courts have taken to tie "foregone conclusion" closely to the "testimonial" analysis and vice versa. 425 U.S. at 411. The Court said: "Surely the Government is in no way relying on the 'truthtelling' of the taxpayer to prove the existence of or his access to the documents. The existence and location of the papers are a foregone conclusion. . . ." *Id.* (citation omitted). In my view, the latter sentence should be read in light of the former. That is, "foregone conclusion" is only a subset of the broader set: instances where sources independent of testimonial aspects of the compulsion fully account for the prosecutor's evidence.

This relationship is illustrated in an example used in *Fisher*: "When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident." *Id.* The Court here is implicitly referring to *Gilbert v. California*, 388 U.S. at 265-67, one of the cases it had just relied upon in more or less overruling *Boyd*. In *Gilbert*, the police got the suspect to write out some handwriting exemplars while he was in custody and being questioned. When the Court calls the implicit admission of ability to write a "near-truism," the

"near" is critical. Consider a kidnapping, in which a ransom note is a major piece of evidence, but the suspect claims illiteracy. Suppose police, posing as terrorists, frightened him into writing something (the text of which had no bearing on the kidnapping). There might be some sort of due process argument, but in using the handwriting sample the prosecutor would not need to rely on any implicit testimonial aspect of the scenario ("Yes, I do know how to write."); accordingly he could use the sample without violation of the defendant's privilege against self-incrimination.

More important is the defendant's implicit admission that the exemplars are his. This is not, strictly speaking, "self-evident"; rather, it is supported by evidence (the testimony of the witnessing police officers) of a nontestimonial aspect of the act of production, here the act of writing. But as the Court says, the government is "in no way relying on the 'truthtelling' of [defendant]" to prove anything: it is relying only on the immediate personal observations of the policemen and on nontestimonial aspects of the defendant's act to link the handwriting to the defendant. Everything else of evidentiary value, namely the idiosyncrasies of the writing, depends only on the writing itself. As we'll see more explicitly below, this matches the relation of a prosecutor to documents delivered pursuant to subpoena. The information *on* the documents stands or falls on its own value, even though (by definition) produced by the defendant's act of production. Thus: for handwriting, the link to the defendant is established by police witnesses and the testimonial value of the defendant's act of production is redundant; for documentary information, so long as the prosecutor depends as here only on information in the documents themselves for the link to defendant, the communicative aspect of the act of delivery is equally redundant.

Existence. In light of the above, the only sense of "existence" that is covered by the Fifth Amendment is that which refers back to the subpoena. The responsiveness of the documents to the subpoena gives knowledge of "the existence of the papers *demanded*," 425 U.S. at 410 (emphasis added). "Yes, these are the records you described in the subpoena." If the government could refer back to the subpoena to identify documents and to clarify relationships that were not clear on their face or by other independent means, then it would be using a testimonial component of the transaction—the witness's implicit statement that the documents match the subpoena's description. Hubbell's claim for blanket exclusion of the contents, by contrast, relies on existence in a quite different sense—the fact that these particular pieces of paper are in being. But this is quite easily confirmed by these papers' own physical presence, which is "self-evident" at the time and place of production and so long thereafter as the government maintains proper custody. Existence in that sense is as "self-evident" as the blood and its characteristics in *Schmerber*, the voice samples and their charactristics in *Wade*, and the handwriting and its characteristics in *Gilbert*.

Some of the language in *Fisher* and *Doe*, to be sure, suggests a more sweeping view of "existence." *Fisher* I have discussed above. *Doe* upholds a decision quashing certain subpoenas, based on trial court findings (endorsed by the court of appeals) that delivery of the documents gave the prosecutor previously absent knowledge of their existence, possession, and authenticity. See *United States v. Doe*, 465 U.S. 605, 613-14 & nn.11-13 (1984). But the implications are quite unclear. The Court relied explicitly and entirely on the "two courts" rule. *Id.* While the majority argues that the findings below were structurally applications of law to fact, see Maj. at 34-35 n.24,

the Court's treatment of them was as simple fact. Second, to the extent that its rehearsing of the arguments embraced in the courts below may suggest the sort of "existence" theory employed by the majority, the inference is drawn in question by the Court's reliance on the anticipated use of the act of production for authentication of the documents, i.e., use of an indisputably testimonial aspect of subpoena compliance. See 465 U.S. at 614 n.13.

Accordingly, the logic of *Fisher* and *Doe*, if not every phrase, clearly supports the prosecutor's right to use information from subpoenaed documents regardless of whether he was previously able to describe them. The particular documents' existence speaks for itself once they have been delivered; so long as his use of them is independent of any *testimonial* aspects of the witness's act of production, that use is consistent with the witness's Fifth Amendment privilege.

* * * *

The majority confuses the issue with a rather odd distinction: if compulsion "acts upon, and requires the exercise of an individual's mental faculties for communication," it is testimonial; if it "merely utilizes the body of the accused as a form of evidence," it is not. Maj. at 39.

To the extent that the majority here acknowledges that the bare physical aspects of a production—the meanings that are directly apparent to the senses—are unprotected by the Fifth Amendment, it is correct. But there is no reason to restrict this to the "body of the accused."

In fact, the majority fails to explain the cases that fall outside this apparent restriction. *Gilbert v. California*, approvingly cited by the majority, concerned a handwriting sample that the suspect had to write out and then turn over to the police. But more telling in *Baltimore Dept.*

of Social Servs. v. Bouknight, 493 U.S. 549, 554-55 (1990). In that case, a woman was ordered to turn over a child whom she was believed to have abused and who was last seen in her custody. The Court held, among other things, that the woman "cannot claim the privilege based upon anything that examination of [the child] might reveal."

Thus in *Bouknight* it was not the body of the *accused* that was used as a form of evidence, but the body of *another*. Documents are exactly analogous: physical objects the examination of which yields evidentiary value or clues. Documents do, of course, represent the concrete embodiment of mental activity, but that is a false lead: these thoughts (the contents of the documents) were, we assume, put to paper quite voluntarily—if they were not, they would unquestionably be protected. See *Doe*, 465 U.S. at 610-11. In *Bouknight* the Court was obviously indifferent to the necessity that the suspect find and turn over a child whose location was completely unknown to the government; the court here should be equally indifferent to the necessity that Hubbell do the same for documents.

Delivery of the child in *Bouknight* clearly depended on the suspect's exercise of her mental faculties; in fact, her intellectual efforts turning up the child were no less then they would have been had the government known its whereabouts in advance. The case thus flatly contradicts the majority idea that self-incrimination occurs whenever the subpoena "requires the exercise of an individual's mental faculties." The majority might say, with internal consistency though not with conformity to the cases, that the government may use the product of forced mental exercise so long the mental exercise is no more than an automaton's execution of intellection already carried out by the government. But that would take it to the position

that a document subpoena must *itself* set forth whatever descriptive detail is necessary (under the majority's murky test) about the documents' character and location. Even the majority evidently recoils at this absurdity.

There are of course non-physical aspects of the production in *Bouknight*. In another part of that opinion, the Court used a different analysis for the suspect's "implicit communication of control over [the child] at the moment of production," 493 U.S. at 455, saying that although this was arguably an incriminating "testimonial assertion," *id.*, some uses of it might be permissible under the doctrine that the Fifth Amendment may not be invoked to resist compliance with certain types of regulatory regimes, *id.* at 555-62. Here, of course, the government has no interest in Hubbell's control of the documents at the moment of production, and seeks to draw no inferences from that control. But the majority's concern here with information about the documents *before* their delivery is utterly different from the *Bouknight* Court's focus on "the moment of production."

* * * *

The majority's confusion is further evident in its attempt to draw some distinction between whether something is "testimonial" and whether it has "testimonial value." See Maj. at 42 n.27, 45-46 n.31. This dissent, the majority argues, wrongly frames the former rather than the latter issue as the key. Putting aside such issues as whether this terminological difference makes sense—if something is not "testimonial," its "testimonial value" is obviously zero—or is to be found in the cases—*Fisher*, for example, simply refers to "the more difficult issue[ ]" of whether the tacit averments . . . are [ ] testimonial," 425 U.S. 410—the actual analysis endorsed by the majority is not much different from the analysis in the "Foregone Conclusion" section above. The majority writes:

> Where the government need not rely upon the truth-telling of the witness, *because it has prior knowledge of the information that will be communicated through the act of production,* 'no constitutional rights are touched.'

Maj. at 46 n.31 (emphasis added) (quoting *Fisher*). The only disagreement here is the underlined portion: for some reason, the majority believes that possession of "prior knowledge" is the only circumstance in which the government "need not rely upon the truthtelling of the witness." But the majority never explains how, under its theory, there is no testimonial self-incrimination if the government need not rely because it already knows, while there *is* testimonial self-incrimination if the government has another reason for dispensing with reliance on communicative aspects of the witness's acts. Nor could any such explanation be consistent with precedent. In *Bouknight*, which concerned a subpoena to turn over a missing child, the Court found that the target could not "assert the privilege upon the theory that compliance would assert that the child produced is in fact [the child sought]" because that fact was one "the State could readily establish," 493 U.S. at 555, despite the fact that the government *could not* have made such a finding until *after* the production.[1] Here, too, the government need not rely on any communicative or testimonial aspect of Hubbell's act of production; once it acquired the documents, their in-

[1] The majority appears to believe that this fact—the match of the child produced to the child sought—was a "foregone conclusion" because "presumably his social worker could testify as to his identity." Maj. at 43 n.27. This indicates either that the majority's definition of "foregone conclusion" includes things that only become apparent *after* the production itself—in which case the majority has no reason to disagree with this opinion—or that the majority believes that there is some way in which one can "readily establish" the identity of a person or thing that cannot yet be inspected.

trinsic value evidently served its purposes quite adequately. The majority imposes a wholly artificial and impermissible limitation on the reasons for which the government "need not rely" on testimonial implications of the act of production.

* * * *

For a district judge, the challenge of the majority's view is to determine the "quantum" of relative prosecutorial ignorance that triggers a self-incrimination violation. Prosecutors know that businessmen keep business records (just as they know that living humans have blood and literate persons have handwriting); this is plainly too little information for the majority. But evidently the prosecutor need not have advance knowledge of the details that he is interested in. See Maj. at 54. Somewhere in that range is an imaginary line which, unlike the equator, can never be fixed or defined with clarity. Henceforth, therefore, the operational meaning of the "act of production" doctrine in our circuit will largely turn on district courts' discretion in this metaphysical classification of prosecutors' knowledge.

Though recognizing that no other court has applied its mind/body distinction explicitly, the majority claims that the existing lower-court cases can be lined up to fit. If so, this seems to me only because the factual detail of the cases is so skimpy and the majority's test so elastic. And to the extent that the cases *can* fairly be viewed as embracing the majority's readiness to squeeze production immunity into a simple "foregone conclusion" analysis, they miss the point. "Foregone conclusion" is just one species of one part of the doctrinal structure the Supreme Court has set out; the majority's obsession with that phrase diverts its focus from the key issue, the presence (or absence) of "testimonial" incrimination.

Let us return to blood and handwriting, the contexts for the key decisions underlying *Fisher*. Of course live humans have blood; of course literate humans have handwriting. These propositions are virtually true by definition. But the interesting data from blood and handwriting sample—blood type, DNA information, handwriting idiosyncrasies—are characteristically unknown to the government in advance. The admissibility of these data stems not from the government's advance knowledge of the obvious, but from two propositions: (1) the critical information extracted from the witness (DNA and blood type, handwriting idiosyncrasies) is non-testimonial in character, see *Fisher*, 425 U.S. at 409, and (2) the prosecutor's knowledge of the link between the witness, on the one hand, and the blood and the handwriting, on the other, is independent of the communications that are implicit in the witness's giving blood or handwriting. Here, similarly, the documents' informational content (the equivalent of the DNA, etc.) is non-testimonial in character, and the Independent Counsel is interested in the documents' link to the witness *only* insofar as it is shown by the contents of the documents.

* * * *

Sensibly construed, the act of production doctrine shields the witness from the use of any information (resulting from his subpoena response) beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven. See DOJ Amicus Br. at 42; Alito, *supra*, at 59-60. The prosecutor would in such a case not be able to identfy, verify someone's control over, or authenticate the documents except to the extent their own contents—or other sources—did so. He would thus make no use of any testimonial aspect of the act of production. Yet, like DNA and handwriting idiosyncrasies,

the contents would themselves be unprotected, except to the extent that deciphering might depend on the context of the subpoena—the information conveyed by the suspect's implicit matching of them with the subpoena description.

This distinction between contents and production is apparently missed by the majority. Its first hypothetical of the murder weapon claims that this "manna from heaven" theory would allow the government to compel a suspect "to incriminate himself verbally" by revealing the location of the murder weapon. But in the majority's hypo, the weapon is obviously the fruit of poisoned testimony: a revelation under compulsion. A more apt instance would be if a suspect had previously—without compulsion—written down the location in his day planner, and the government subpoenaed the planner. The production of the day planner, like the production of a missing child, is compulsory but non-testimonial. The much more harmful contents are obviously testimonial, but they are not the fruit of any unlawful compulsion (so long as the government's use is independent of the context of the subpoena).[2]

On remand the only question should be whether the Independent Counsel complied with the limits set by the above principle. Accordingly, I dissent on this issue.

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[2] The majority's second hypothetical, see Maj. at 62-63, is too imprecise to bear much analysis, but if it posits that the government in fact relies upon the communication implicit in the defendant's delivery of the murder weapon to link it to him, then that weapon must of course be excluded. Moreover, the hypothetical subpoena might well be invalid for being "unreasonable or oppressive," Fed. R. Crim. P. 17(c)—a defect unrelated to self-incrimination.

APPENDIX B

[Filed Jul. 1, 1998]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. Action No. 98-0151 (JR)

UNITED STATES OF AMERICA,

v.

WEBSTER L. HUBBELL, *et al.*,
Defendants.

MEMORANDUM OPINION

Before this Court are four motions challenging the indictment in this tax evasion case.

One of the motions seeks dismissal of the entire case and will be granted: The charges in the indictment neither relate to nor arise out of the subject of the original grant of jurisdiction to the independent counsel, and the referral order under which the independent counsel is proceeding impermissibly expands that jurisdiction.

A second motion, dispositive only as to defendant Webster L. Hubbell, will also be granted: [1] The independent counsel concedes that he built his case against Mr. Hubbell using 13,120 pages of records that Mr.

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[1] Although dismissal of the entire indictment makes it unnecessary to decide any of the other motions, the certainty of appellate review makes it prudent to rule on all of the important questions presented.

Hubbell was compelled to produce under subpoena. That use violates the immunity given to Mr. Hubbell by the United States District Court for the Eastern District of Arkansas.

Defendants' third and fourth motions are to dismiss the mail and wire fraud charges and to dismiss a single charge of violation of the "omnibus" provision of the criminal tax code. Those motions will be denied.

I. MOTION TO DISMISS THE INDICTMENT AS BEYOND THE AUTHORITY OF THE INDEPENDENT COUNSEL

Independent counsels are appointed pursuant to the Ethics in Government Act.[2] Congress carefully limited their authority, as well as that of the Special Division that appoints them.[3] Those very limitations were identified by the Supreme Court as critical to the constitutionality of the Ethics in Government Act. *Morrison v. Olson*, 487 U.S. 654 (1988). The defendants in this case assert that the Special Division exceeded the statutory and constitutional limits on its authority by referring the subject matter of this case to Independent Counsel Kenneth Starr. They are correct.

This independent counsel was appointed by the Special Division, upon the application of the Attorney General, on August 5, 1994. The appointing order (the "Original Grant") gave him authority to investigate

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2 Independent counsel Starr was appointed pursuant to the Ethics in Government Act of 1978, as amended by the Independent Counsel Reauthorization Act of 1994, *see* 28 U.S.C. §§ 591-599.

3 The Special Division is a panel of three judges designated by the Chief Justice and assigned to a division of the United States Court of Appeals for the District of Columbia "for the purpose of appointing independent counsels." 28 U.S.C. § 49.

> [W]hether any individuals or entites have committed a violation of any federal criminal law, . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Original Grant also gave the independent counsel the authority to "investigate other allegations or evidence of violation of any federal criminal law . . . by any person or entity developed during the Independent Counsel's investigation referred to above *and connected with or arising out of* that investigation." (Emphasis added). The Original Grant gave the independent counsel further authority to investigate "any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above," as well as the activities of any conspirators and/or aiders and abettors "involved in any of the matters described above." Finally, presumably in order to ensure that the independent counsel was given all the authority he must have under the Ethics in Government Act, the Special Division recited the exact language of §593(b)(3):

> [T]he Special Division shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes . . . that may arise out of the investigation or prosecution of the matter with

respect to which the Attorney General's request was made, including perjury, obstructon of justice, destruction of evidence, and intimidation of witnesses.

Section 594(e) of the Ethics in Government Act allows an independent counsel to ask either the Attorney General or the Special Division to refer "matters related to the independent counsel's prosecutorial jurisdiction." One month after the Original Grant, acting pursuant to § 594 (e), the independent counsel requested, and the Special Division granted, the referral to his office of certain matters dealing with defendant Webster L. Hubbell. Specifically, the Special Division "expressly expanded"[4] the independent counsel's jurisdiction to include:

> [W]hether Webster L. Hubbell, a covered person under 28 U.S.C. § 591(b), violated any federal criminal law (including mail fraud and criminal tax violations) in his billing or expense practices while a member of the Rose Law Firm, and [ ] all matters arising from that investigation to the same extent as all other criminal matters arising under the jurisdiction set forth in the original order.

In re Madison Guaranty Savings & Loan Association (Webster L. Hubbell, (Spec. Div. Sept. 1, 1994) (hereinafter "Billings Referral"). The independent counsel thereafter brought charges against Mr. Hubbell for fraudulent billing while he was in the private practice of law in Little Rock, Arkansas, and for income tax evasion. Mr. Hubbell pleaded guilty to two counts of mail fraud and tax evasion on December 6, 1994. He was sentenced to twenty-one months' imprisonment and was incarcerated from August 7, 1995 to February 12, 1997.

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[4] These words have no effect. The Special Division does not have the power to "expand" the jurisdiction of an independent counsel under § 594(e). *Morrison v. Olson*, 487 U.S. at 680 n.18.

On January 6, 1998, the Special Division granted another request by the independent counsel for referral of matters involving Mr. Hubbell. It is this second Hubbell referral that gives rise to the present case and this motion. It gave the independent counsel authority to investigate

> (i) whether Webster L. Hubbell or any individual or entity violated any criminal law, including but not limited to criminal tax violations and mail and wire fraud, regarding Mr. Hubbell's income since January 1, 1994, and his tax and other debts to the United States, the State of Arkansas, the District of Columbia, the Rose Law Firm, and others; and
>
> (ii) whether Webster L. Hubbell or any individual or entity violated any criminal law, including but not limited to obstruction of justice, perjury, false statements, and mail and wire fraud, related to payments that Mr. Hubbell has received from various individuals and entities since January 1, 1994.

In re Madison Guaranty Savings & Loan Association, (Spec. Div. Jan. 6, 1998) (hereinafter "Tax Referral"). A grand jury in this District handed up this indictment of Mr. Hubbell, his wife, his accountant, and his tax lawyer, on April 30, 1998. All ten counts of the indictment relate to an alleged scheme to avoid paying the taxes Mr. Hubbell agreed to pay as part of his 1994 guilty plea and taxes on income Mr. Hubbell received after leaving the Department of Justice in 1994.

A. Reviewability of the Special Division's referral oder

The independent counsel's first response to this motion was to challenge defendants' right to question his authority. He said in his written response, using the language of standing, that defendants had "identified no concrete harm that has accrued (or will accrue) to them

because the Independent Counsel is prosecuting this matter, rather than the Department of Justice," p. 14. The scope of this argument was limited by the independent counsel's concession, at oral argument, that a criminal defendant is indeed harmed by an *ultra vires* indictment and that these defendants would have had standing to challenge the independent counsel's jurisdiction if the Special Division had not issued the Tax Referral. Tr. at 63, 79-80.[5] What remains of the independent counsel's standing argument, accordingly, is the assertion that the Special Division's Tax Referral is unreviewable, or, at least, that it is not reviewable by a United States District Court.

That core argument requires analysis of the exact nature of a referral order under § 594(e) of the Ethics in Government Act: Is it, as this independent counsel asserts, a nonreviewable discretionary act? Is it, as two judges of this Court have suggested, controlling authority in this Circuit, or at least precedent flowing from the proper exercise of an appellate court's Article III powers? Or is it a ministerial act, flowing from the Special Division's Article II or III powers, that is reviewable on a proper challenge?

Nonreviewable discretionary act: In *United States v. Tucker*, 78 F.3d 1313, 1317 (8th Cir.), *cert. denied*, 117

[5] The independent counsel was right to make those concessions. Defendants may, and do, challenge the authority of their prosecutors. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (contempt conviction reversed where court improperly appointed the beneficiary of the contempt order to prosecute defendant for violating that order); *United States v. Wilson*, 26 F.3d 142, 147-48 (D.C. Cir. 1994) ("The core of their claim is . . . that the OIC [ ] withdrew any authority that the Florida [United States Attorney] otherwise had to investigate and conduct grand jury proceedings"), *cert. denied sub nom. Briscoe v. United States*, 514 U.S. 1051 (1995).

S.Ct. 76 (1996), the Eighth Circuit held that a referral to the independent counsel of a "related" matter under § 594(e) *by the Attorney General* is a nonreviewable act of prosecutorial discretion. The *Tucker* case did not involve a referral *by the Special Division* and is not precedent for the question presented here. If a Special Division referral order were an unreviewable act of prosecutorial discretion, the referral power would be unconstitutional. *Morrison v. Olson* allowed the independent counsel statute to pass constitutional muster only because the duties assigned to the Special Division are either so limited as to be merely ancillary to the powers assigned to judges under the Appointments Clause (this is *Morrison*'s characterization of the Special Division's power to define an independent counsel's jurisdiction), or "essentially ministerial," *see Morrison*, 487 U.S. at 681. The Special Division would be acting in an unconstitutional "supervisory" executive capacity if it exceeded those limits. *See id.* at 680-81 (citing *Buckley v. Valeo*, 424 U.S. 1, 123 (1976)). A § 594(e) referral by the Special Division cannot constituitonally be an unreviewable discretionary act.

Controlling authority or precedent: The Special Division consists of three Article III judges sitting as a division of the D.C. Circuit, *see* Note 3, *supra*. Two judges of this District Court, both confronted with challenges to a § 594(e) referral related to an independent counsel investigation of a former Secretary of Agriculture, concluded that they were bound by the referral:

> Congress designated the Special Division a "division of the United States Court of Appeals for the District of Columbia Circuit." 28 U.S.C. § 49. For this court to review the constitutionality of the referral jurisdiction granted in *In re Espy* would re-

> quire it to sit in an appellate capacity over the D.C. Circuit, which it cannot and will not do. If the Special Division concluded that "the new matter is demonstrably related to the factual circumstances that gave rise to the Attorney General's initial investigation and request for appointment of an independent counsel," . . . this court is not empowered to disturb those findings. Nor may this court substitute its own constitutional analysis of § 594(e) . . . .

United States v. Blackley, 986 F. Supp. 607, 616 (D.D.C. 1997) (Lamberth, J.); *see also United States v. Espy*, 989 F. Supp. 17, 33 (D.D.C. 1997) (Urbina, J.).

I respectfully disagree and conclude that the Supreme Court's analysis in *Morrison v. Olson* compels a different answer.[6] The Ethics in Government Act provides for the designation of three judges and for their assignment to a division of the D.C. Circuit, but *only* "for the purpose of appointing independent counsels," 28 U.S.C. § 49(a). *Morrison* made it clear that the power to appoint independent counsels derives solely from the Appointments Clause, Art. II, § 2, cl. 2, which enables judges to appoint inferior officers of the United States government. 487 U.S. at 676-77. "While nominally a division of the Court of Appeals for the District of Columbia Circuit, the Special Division has no functional relationship to the Court of Appeals. . . . Further, because the Division must include two judges who are not members of the Court of Appeals for the D.C. Circuit, it cannot constitute a panel of the Court authorized to decide 'cases or controversies' within the jurisdiction of the D.C. Circuit, and subject to the Court's *en banc* review." *In the Matter of*

[6] The independent counsel does not contend otherwise. Tr. at 68.

a *Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 378 (Judicial Council of the D.C. Cir. 1994).

The Special Division in fact is not a court of appeals. The Special Division hears referral applications *ex parte*, as judges hear wiretap applications, 18 U.S.C. §§ 2516, 2518. And, like wiretap orders, referral orders could not be immune from collateral attack or appellate review. If they were, the effect would be to make binding on affected individuals rulings that were never litigated in an adversarial proceeding.

Ministerial act: The Supreme Court in *Morrison v. Olson* suggested that, while the Special Division's power to appoint independent counsels derives from Article II, other duties of the Special Division do not, including its § 594(e) referral power. *Morrison*, 487 U.S. at 680 ("The Act also vests in the Special Division various powers and duties in relation to the independent counsel that, because they do not involve appointing the counsel or defining his or her jurisdiction, cannot be said to derive from the Division's Apointment Clause authority"). Those other duties the Court called "essentially ministerial" and not repugnant *for that reason* to the case or controversy requirement of Article III, even though they "do not necessarily or directly involve adversarial proceedings with a trial or appellate court." *Id.* at 681 n.20. In reaching this conclusion, the Court noted that Article III courts have traditionally performed a number of similar functions *ex parte*, such as authorizing wirtetaps, compelling the testimony of witnesses before grand juries, and issuing search warrants. *See id.* at 681-82.[7]

[7] It is worth noting that none of the ministerial acts used as analogies in the Supreme Court's *Morrison* decision are unreviewable. *See, e.g.*, 18 U.S.C. 2518(10)(a) (permitting aggrieved parties to challenge introduction of wiretap evidence against them in

If the Special Division's § 594(e) referral function is an Article III function, it must be ministerial, rather than "supervisory" or "executive," or it violates Article III. *Id.* The Special Division thus may *interpret* the independent counsel's Original Grant. It may not *expand* the independent counsel's jurisdiction without the consent of the Attorney General, which consent is required by another part of the Act (§ 593(c)(2)). *Id.* at 680 n.18. This limitation is constitutional, and, if it is to mean anything at all, must be enforceable upon a proper challenge.

It may also be correct to classify the Special Division's referral power under Article II, as ancillary to the power to appoint inferior officers under the Appointments Clause. The *Morrison* Court suggested otherwise, as noted *supra*, but the Court also noted that the power to refer matters related to the independent counsel's original jurisdiction may legitimately *include* the ability to interpret the scope of the jurisdiction. *Id.* at 685 n.22.

Labeling the referral function as ancillary to an Article II function does not affect the reviewability of § 594(e) referral orders of the Special Division. A referral order provides the authorization necessary for the independent counsel to present evidence to a grand jury. Defendants' claim may thus be viewed as a challenge to this court's jurisdiction, *see e.g., United States v. Navarro*, 959 F. Supp. 1273, 1277-78 (E.D. Cal. 1997) (unauthorized attorney's presence before a grand jury implicates the court's jurisdiction); *United States v. Mendoza*, 957 F.

later proceedings); *Illinois v. Gates*, 462 U.S. 213 (1983) (permitting challenge to facial validity of search warrant where supporting affidavit contained information from an anonymous informer); *Brown v. United States*, 359 U.S. 41 (1959) (permitting appeal of witness's challenge to court's contempt order where witness refused to testify before grand jury after immunity granted).

Supp. 1155, 1156-57 (E.D. Cal. 1997) ("The courts need some assurance that the virtually unlimited and unreviewable discretion of a federal prosecutor in deciding whether to seek an indictment, and on what charges, is exercised by an authorized person and not some interloper"); *see also United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (dismissing writ of certiorari for lack of jurisdiction where the initial petition was filed by a government lawyer acting without authority to do so).[8]

B. Relatedness of the Tax Referral to the Original Grant

The Special Division may authorize an independent counsel to investigate matters that are "demonstrably related" to the Attorney General's application for appointment. *Morrison v. Olson*, 487 U.S. at 679. It follows, and is undisputed, that the "demonstrably related" rule governs referrals as well. *See id.*; *see also Tucker*, 78 F.3d at 1321. The Special Division itself has stated:

> [A] matter referred by this court, rather than by the Attorney General, has to meet an apparently higher standard of being "demonstrably related" . . . . "[R]elatedness for purposes of referral under § 594 (e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." *Tucker*, 78 F.3d at 1313.

In re Espy, 80 F.3d 501, 507-508 (D.C. Cir., Spec. Div., 1996) ("*Espy I*"). In granting the referral application in *Espy I*, the Special Division was persuaded that

[8] Alternatively, the claim may be viewed as a "nonjurisdictional structural constitutional objection[]," *see Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878-79 (1991) (citing cases), but this is a distinction without a difference.

"the referral matter overlaps his current jurisdiction in terms of persons involved, witnesses, patterns of conduct, and applicable law, and that the factual basis of the referral matter arose directly from" the independent counsel's investigation of the Secretary's alleged receipt of illegal gifts. *Espy I*, 80 F.3d at 508. The Special Division very recently applied the same standard to deny referral of a different Espy matter, because there it found that the application raised "allegations concerning criminal conduct on the part of Secretary Espy and others in violation of other criminal statutes outlawing a different category of conduct and occurring on different occasions than those set forth in the grant of jurisdiction." *In re Espy*, —— F.3d ——, 1998 WL 307381 (D.C. Cir., Spec. Div., June 12, 1998) ("*Espy II*"). The *Espy II* decision rejected the rationale advanced by the independent counsel in that case, that "the matters are related because of the common prospective subject, the common concern for misconduct by a high official and the potential presence of eight unnamed common witnesses." *Id.*

The Special Division's analysis in the *Espy* matters is persuasive and appears to comport with *Morrison*. In the present case, however, the reasons for the Special Division's decision to issue the Tax Referral are unstated. It is impossible to tell whether the same analysis was applied or what record was before the Special Division. We do not know, for example, whether the Attorney General responded to the independent counsel's § 594(e) application in this case, whereas in the *Espy* matters the Attorney General objected to the referral applications, forcing the Special Division to resolve the dispute. In any event, and bearing respectfully in mind that it is only the independent counsel that has "intimate knowledge of the course of the investigation, including witness statements, and of other proceedings that may be ongoing before the grand

jury," *Tucker*, 78 F.3d at 1318, I must determine whether the independent counsel has shown that the Tax Referral is "demonstrably related" to the Original Grant. A mixed question of law and fact will be reviewed for clear error as to factual findings and *de novo* as to legal conclusions. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *United States v. Garrett*, 959 F.2d 1005, 1007 (D.C. Cir. 1992). Where, as here, there are no factual findings, the review is effectively *de novo*.

The Madison-Whitewater matters that were the subject of the Original Grant and the tax matters that are the subject of this case have nothing in common—nothing, at least, that appears on this record—except Webster Hubbell. The independent counsel has made no serious effort to show the "overlap" found to exist in the *Espy I* referral. He has identified no common witnesses, described no similar patterns of conduct, cited no similar applicable law. Nor has the independent counsel offered any real resistance to defendants' submission that this case involves "violations of other criminal statutes outlawing a different category of conduct and occurring on different occasions than those set forth in the [Original Grant] of jurisdiction." *Espy II*, *supra*. The independent counsel's explanation of how this indictment is "connected with" the Original Grant was a recitation spanning six degrees of relationship. Tr. at 75. I find the asserted connection too attenuated and conclude that neither the Tax Referral order nor the indictment is "connected with" or "demonstrably related to" the Original Grant.

When pressed to demonstrate the relationship between the Tax Referral and the Original Grant, indeed, the independent counsel always returns to what seems to be his default position: that he has always been authorized to investigate obstruction of his original investigation;

that, pursuing that line, he investigated Mr. Hubbell's post-conviction consulting income "from entities associated with the Clinton Administration at a time when Mr. Hubbell clearly was under investigation, and known publicly to be an important witness regarding Madison Guaranty/Whitewater matters," Response at 23; and that he discovered these tax charges in the course of that inquiry.

That default position relies directly upon the Original Grant and effectively jettisons the Tax Referral order.[9] The argument is that, so long as the independent counsel is investigating obstruction, he may prosecute whatever crimes he may come across, committed by whomever he may come across, regardless of whether the charges or the individuals are demonstrably related in any substantive way to the Original Grant, and regardless of whether he has found any obstruction. Response at 7-8, 22, 27-28; Tr. at 74-77.

This argument invokes the other half of the Original Grant of authority to investigate matters "connected with or *arising out of*" the Madison Guaranty/Whitewater investigation. The term "arising out of," as it is used in the Ethics in Government Act, refers to obstruction of the independent counsel's investigation. *See* 28 U.S.C. § 593 (b)(3) (arising out of jurisdiction includes "perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.") It is not disputed that the independent counsel has jurisdiction to investigate and prosecute such conduct. But his argument here is that he is

[9] At oral argument, in fact, independent counsel minimized the importance of the Tax Referral, calling it a "belt-and-suspenders" device. Tr. at 76. That drew from defense counsel the speculation that another motive for the referral application may have been an attempt to insulate the independent counsel's authority from judicial review. Tr. at 81-82.

entitled to investigate matters that "arise out of" investigation of matters that "arise out of" the Original Grant.

The controlling constitutional principles articulated in *Morrison* would be offended by permitting the independent counsel to tack these tax charges onto the Original Grant on the theory that they "arose out of" an apparently unsuccessful investigation of allegations that Mr. Hubbell was involved in an obstruction of the original Whitewater investigation. Defendants have argued, without any effective response from the independent counsel, that his position, if adopted, would allow the independent counsel to "stray in as many directions and . . . as far in any given direction as [his] energy and zeal might take him. . . . [T]he Attorney General, when ceding a piece of the Justice Department's jurisdiction, would have no way of knowing how much jurisdiction the Independent Counsel might later take." Brief at 3. The "demonstrable relationship" requirement will not support the prosecution of factually unrelated charges whose only connection to the Original Grant is that they "arose out of" an obstruction investigation, which in turn "arose out of" the Original Grant.

Had the independent counsel applied for a referral from the Attorney General under § 594(e), as he did in *Tucker, supra,* or asked the Attorney General to petition the Special Division to expand his jurisdiction under § 593(c), as he did in the investigation of the matters involving Monica Lewinsky, *see In re Motions of Dow Jones & Co.*, —— F.3d ——, 1998 WL 216042 (D.C. Cir., May 5, 1998), *petition for cert. filed,* 66 U.S.L.W. 3790 (U.S. June 3, 1998) (No. 97-1959), he might have received proper authority—or at least unreviewable authority—to prosecute these charges. As it is, however, the indictment must be dismissed.

II. MOTION TO DISMISS AS TO WEBSTER HUBBELL FOR VIOLATION OF HIS USE IMMUNITY

On November 1, 1996, after the independent counsel had succesfully prosecuted Webster Hubbell under the Billings Referral, and while Mr. Hubbell was still in prison, the independent counsel served him with a subpoena commanding the production of all his business, financial, and tax records from January 1, 1993 to the date of the subpoena. Mr. Hubbell refused to comply, invoking his Fifth Amendment privilege against self-incrimination. The independent counsel thereupon moved for, and the United States District Court for the Eastern District of Arkansas granted, an order compelling production of the documents. Pursuant to 18 U.S.C. § 6002, the order also granted Mr. Hubbell "immunity to the extent allowed by law." *In re Grand Jury Proceedings*, No. GJ-96-3 (E.D.Ark., W.D. Nov. 14, 1996). Mr. Hubbell complied with that order and produced 13,120 pages of documents to the independent counsel. While the original purpose of the subpoena was to investigate allegations of obstruction of justice, the independent counsel brought no obstruction charges. Instead—and the independent counsel concedes this important point—he "used the contents of these documents to identify and develop evidence that led to this prosecution." Response at 5. Webster Hubbell now invokes the use immunity given to him with the order to compel production and moves to dismiss the charges against him or, in the alternative, for a *Kastigar* hearing to determine whether the independent counsel has impermissibly used any of his immunized testimony against him. *See Kastigar v. United States*, 406 U.S. 441 (1972).

A. Use immunity

The "use and derivative use" immunity statute, 18 U.S.C. § 6002, provides that, where a witness validly asserts the privilege against self-incrimination and is given use immunity, the witness may not refuse to testify,

> but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

This provision was enacted in the Omnibus Crime Control Act of 1970 to implement a suggestion by the Supreme Court that, contrary to the conventional wisdom of the time, a statute providing that testimony might be compelled under something less than full transactional immunity might satisfy the Fifth Amendment. *See Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964) (compulsion of testimony over assertion of right against self-incrimination permissible if "the witness and the Federal Government [are left] in substantially the same position as if the witness had claimed his privilege in the absence of" a grant of immunity.)[10]

Section 6002 was tested and upheld in *Kastigar*. The Supreme Court found that § 6002 "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity is therefore coextensive with the privilege and suffices to supplant it." *Id.* at 462. Moreover, the Court noted, a witness granted immunity under

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[10] Before *Murphy*, it was assumed that testimony could be compelled consistently with the Fifth Amendment only under a grant of full transactional immunity. *See Counselman v. Hitchcock*, 142 U.S. 547, 586 (1896) ("a statutory [immunity statute], to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.")

the statute and then prosecuted "is not dependent upon the integrity and good faith of the prosecuting authorities," *id.* at 460, because he "need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Id.* at 461-62.

The requirement of § 6002 that "no information directly or indirectly derived from [immunized] testimony or other information [gained through a grant of immunity]" may be used against an immunized witness, and *Kastigar*'s prohibition on "any use" of immunized testimony, *see* 406 U.S. at 460, have been strictly adhered to in this Circuit. In *United States v. North*, 920 F.2d 940, 941-42 (D.C. Cir. 1990) (*per curiam*) (*"North II"*), *cert. denied*, 500 U.S. 941 (1991), the court held that the prosecution of Oliver North might be infirm even though the prosecution had sealed its evidence with the court before the defendant gave his immunized Congressional testimony.[11] The problem, the court held, was the possibility that witnesses against the defendant might have seen his immunized testimony on television and allowed it to taint their own trial testimony.

The independent counsel has indicated that a *Kastigar* hearing is unnecessary because he "will make no bones about the fact that [he] did use the information provided by Mr. Hubbell pursuant to the production immunity." Tr. of Status Conf., June 2, 1998, at 8. He argues that the instant motion "will rise and fall on the law." *Id.* The independent counsel did not qualify that oral state-

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[11] North had been given use immunity for his Congressional testimony pursuant to § 6002. *See United States v. North*, 910 F.2d 843, 851 (D.C. Cir. 1990) (*per curiam*) (*"North I"*), *opinion withdrawn and superseded in part, see North II.*

ment in his written submission on the question, but remained committed to his position that "there is no need for a hearing pursuant to *Kastigar* . . . ," because it was appropriate for him to "examine the records' contents to find and develop evidence for this prosecution." Response at 21. *See also id.* at 3 ("it was appropriate for the United States to use the records' contents to identify and develop evidence"). Those concessions compel me to find, and I do find, that all of the evidence the independent counsel would adduce at trial in support of the charges brought against these defendants was directly or indirectly derived from the documents Mr. Hubbell produced under subpoena.

B. Act-of-production immunity

The independent counsel's argument in opposition to the motion to dismiss starts, not with § 6002 or with *Kastigar*, but from the premise that the contents of voluntarily prepared documents are never protected by the Fifth Amendment privilege. *See Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984). From this premise, which is beyond dispute, the independent counsel contends that only Mr. Hubbell's act of producing the documents needed to be immunized, that the "to the extent allowed by law" language of the immunity order extended only to the act of production, and that it was accordingly legitimate for the independent counsel to use the documents themselves, and their contents, to discover and build his case against Mr. Hubbell. He asserts that all the documents, and all the information derived from them, may be used against Mr. Hubbell at trial and that "the United States is free to use the records' contents to create a link" between the defendant and the records, Response at 16, but only so

long as the factfinder is never told that it was Mr. Hubbell who produced the documents.[12]

The cases do not answer the precise question presented here, but they do provide guidance. The Fifth Amendment is implicated by the compelled production of unprivileged documents only when one or more testimonial aspects of the act of production is itself incriminating. *Fisher*, 425 U.S. at 409-411; *Doe*, 465 U.S. at 612-13. The testimonial aspects of the act of production are: (1) that documents exist; (2) that the person producing them possessed them; and (3) that they are authentic, *Fisher*, 425 U.S. at 410-11. Even if one or more of those testimonial aspects is incriminating, the Fifth Amendment privilege does not attach unless it, or they, add to the "sum total of the government's information." *Id.* at 411. A grant of immunity must be "as broad as the privilege" itself, *Doe*, 465 U.S. at 617 n.17; *see also Kastigar*, 406 U.S. at 453 ("a grant of immunity must afford protection commensurate with that afforded by the privilege"); *Sealed Case I*, 791 F.2d at 182 ("the scope of immunity afforded by § 6002 is, by definition, whatever is necessary to protect the witness's privilege against self-incrimination"), and it must leave the witness "in substantially the same position" as if he had asserted the Fifth Amendment. *Murphy*, 378 U.S. at 79. If and to the extent there is immunity, after the application of these principles, then both the statute and *Kastigar*, 406 U.S. at 453, require

[12] At oral argument, the independent counsel relied heavily for this proposition upon *United States v. Porter*, 711 F.2d 1397 (7th Cir. 1983). That decision has been characterized by the Court of Appeals for this Circuit as "inconsistent not only with *Kastigar* and the holdings of other Circuits . . ., but also with prior expressions of the Seventh Circuit itself." (cititions omitted). *In re Sealed Case*, 791 F.2d 179, 192 (D.C. Cir.) (Scalia, J.), *cert. denied sub nom. Wiggins v. United States*, 479 U.S. 924 (1986) ("*Sealed Case I*").

that the immunity protect not only the actual testimony or information compelled, but also its fruits.

The necessary analysis thus determines, first, which aspect or aspects of the defendant's production of documents was testimonial: Did he implicitly testify only that the documents were authentic, or only that they were in his possession, or did he also implicitly testify as to their very existence? The answer to that question determines the breadth of the privilege and the breadth of the immunity that has been granted.[13]

The independent counsel's central argument here (which may be characterized as "no problem as long as the finder of fact never learns who produced the documents") might be viable if the only testimonial aspects of Mr. Hubbell's production under subpoena were authenticity and possession. But the argument fails because it does not cover—indeed, it practically ignores—the question of the documents' existence. The documents Mr. Hubbell turned over under subpoena *concededly* added to the "sum total" of the independent counsel's information about him. The independent counsel does not claim that he knew *any* of the facts relevant to the charges in this indictment at the time of the subpoena: he conceded at oral argument that he learned of the Bridgeport Group, the F.B.O. account at the Pulaski County Bank, and the "pension account check swap" charged in the indictment only through the

[13] The one Supreme Court Justice to have addressed the effect of act-of-production immunity on a subsequent prosecution suggested a similar mode of analysis. *See Fisher*, 425 U.S. at 433-34 (Marshall, J., concurring) (permissible use of documents depends on which testimonial components of production were implicated by the subpoena). This framework is also supported by several commentators. *See* Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va.L.Rev. 1, 41-43 (1987); Kenneth J. Melilli, *Act-of-Production Immunity*, 52 Ohio St.L.J. 223, 258-60 (1991).

documents. Tr. at 34; *see also* Response at 21 n.7. The subpoena itself was so broad as to belie any previous knowledge of those allegations. *See, e.g.*, Subpoena Rider, ¶¶ A and B (requesting "[a]ny and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value" from 1993 to 1996); *id.* ¶ C (requesting "[a]ll bank records of Webster Hubbell, his wife, or children for all accounts" from 1993 to 1996); *id.* ¶ D (requesting "[a]ny and all documents reflecting, referring, or relating to time worked or billed by Webster Hubbell" from 1993 to 1996); *id.* ¶ E (requesting "[a]ny and all documents reflecting, referring, or relating to expenses incurred by and/or disbursements of money by Webster Hubbell during the course of any work performed" from 1993 to 1996). Indeed, the independent counsel was not even pursuing tax evasion charges at the time of the subpoena. *See* Response to Jurisdiction Motion, at 7-8, 22-23. The independent counsel does not—and at oral argument conceded that he could not, *see* Tr. at 20-21—claim that these documents would have been obtained by means of a search warrant based on probable cause. Independent counsel asserted at oral argument that he could have "gotten a Dun & Bradstreet" on Mr. Hubbell, "subpoenaed the individual banks . . . gone to the papers he filed with the IRS . . . the accountant . . . [and] his credit card companies" Tr. at 22. He did not explain, however, how he would have known what to look for in order to find such things as the Pulaski County Bank account, which was not even in Mr. Hubbell's name. The assertion of counsel does not begin to show that the independent counsel's knowledge of the documents or their contents was a "foregone conclusion," *Fisher*, 425 U.S. at 411, or meet *Kastigar*'s "heavy burden" of proving that "all evidence [the prosecution] seeks to introduce is untainted by the

immunized act of production." *Sealed Case I*, 791 F.2d at 182.

The Fifth Amendment implications of compliance with a subpoena like the one in this case were discussed in *United States v. Fox*, 721 F.2d 32, 38 (2nd Cir. 1983). There, the court held that a "broad-sweeping summons" seeking all books and records of a sole proprietorship implicated the "existence" component of compelled testimonial communication identified in *Fisher*. *Id.* Such a summons, the court held, appeared to be an "attempt[] to compensate for [the prosecutor's] lack of knowledge by requiring [the witness] to become the primary informant against himself. [citations omitted.] It is precisely this sort of fishing expedition that the Fifth Amendment was designed to prevent." *Id. See also In re Sealed Case*, 832 F.2d 1268, 1280 (D.C. Cir. 1987) (document subpoena unenforceable absent immunity unless government shows that it "possesses sufficient evidence to render [the testimonial components of production] a 'foregone conclusion' ") ("*Sealed Case II*");[14] *U.S. v. Argomaniz*, 925 F.2d 1349, 1356 (11th Cir. 1991) (lower court's enforcement of subpoena absent immunity reversed because witness "would actually be informing the govern-

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[14] The main holding of *Sealed Case II* (which involved the application of the Fifth Amendment to a custodian of records of a collective entity) has been effectively overruled by *Braswell v. United States*, 487 U.S. 99 (1988), and the District of Columbia Circuit has recognized as much, *see In re Sealed Case (Government Records)*, 950 F.2d 736 (1991). *Braswell*, however, did not concern the language of *Sealed Case II* relevant here. Indeed, at least in dicta, it lends support to defendant's position. *See* 487 U.S. at 117 ("a grant of act of production immunity can have serious consequences. . . . Even in cases where the Government does not employ the immunized testimony for any purpose—direct or derivative—against the witness, the Government's inability to meet the 'heavy burden' it bears may result in the preclusion of crucial evidence that was obtained legitimately.")

ment that he had income in the years in question"); *In re Grand Jury Proceedings, Subpoenas for Documents*, 41 F.3d 377, 380-81 (8th Cir. 1994) ("broad-sweeping" subpoena unenforceable absent immunity because compliance would require witness to "provid[e] identifying information"); *In re Heuwetter*, 584 F. Supp. 119, 126 (S.D.N.Y. 1984) (subpoena unenforceable absent immunity because "the Government . . . is clearly uncertain about the existence of the documents and [] the forced production of these papers may compel the [movant] to add to the sum total of the government's information") (citations and internal quotations omitted); *In re Grand Jury Investigation*, 599 F. Supp. 746, 748 (S.D.Tex. 1984) (compelled disclosure of documents unenforceable absent immunity because, while "the government appears to have some evidence," movant's compelled compliance may "provid[e] the government with the incriminating link necessary to obtain an indictment"); *In re Grand Jury Subpoenas Served Feb. 27, 1984*, 599 F. Supp. 1006, 1015-16 (E.D.Wash. 1984) (subpoena that would require witness to provide "information the government does not already have" implicates existence and possession prongs of *Fisher* unless government meets burden of showing that " 'possession [and] existence . . . [are] a foregone conclusion' ") (citing *Doe*, 465 U.S. at 614 n.13); *United States v. McCollom*, 651 F. Supp. 1217, 1222-23 (N.D. Ill.) (subpoena not enforced on grounds of judicial economy as it relates to accounts not already known to government because "there is little point in forcing [target] to produce documents that the government cannot use either directly or derivatively"), *aff'd*, 815 F.2d 1087 (7th Cir. 1987); *cf. In re Grand Jury Subpoena Duces Tecum date Nov. 13, 1984)*, 616 F. Supp. 1159, 1161 (E.D.N.Y. 1985) (existence prong of *Fisher* not implicated because "the government's ex parte affidavit establishes that much is known about this petitioner's activities. The government is aware that he keeps a set of partnership books, and is aware of two bank accounts").[15]

The subpoena served on Mr. Hubbell was the quintessential fishing expedition. The independent counsel freely admits that he was not investigating tax-related charges when he issued it. Response to Jurisdiction Motion, at 7-8. Instead, he "learned about the unreported income and other crimes from studying the records' contents," Response at 21 n.7. His application for authority to *investigate* potential tax violations by the Hubbells was not filed with the Special Division until December 31, 1997, fourteen months *after* the subpoena had issued.

Mr. Hubbell's compelled production of documents allowed the independent counsel to build a case against Mr. Hubbell different in all material respects from the case for which they had been subpoenaed. Mr. Hubbell was thereby turned into the primary informant against himself.

The motion to dismiss all counts against defendant Webster Hubbell must be granted.

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[15] The independent counsel's assertion, in footnote 6 of its Response, that it knew from its earlier prosecution of defendant that he "created business records and income records for himself and his family" is of no moment. The "existence" prong of the *Fisher* analysis goes to the existence of the information contained in the documents, not to the fact that the witness keeps records. *See Fisher*, 425 U.S. at 411 ("existence [is] a foregone conclusion [because] the taxpayer adds little or nothing to the sum total of the government's information by conceding that he has the papers"); *Fox*, 721 F.2d at 37-38 (irrelevant that government knew doctor kept business records, because "IRS had no way of knowing [from information already available to it] whether he has records to support all of his claimed deductions; [or] whether he possesses records that reflect unreported taxable income.")

III. MOTION TO DISMISS MAIL AND WIRE FRAUD COUNTS

All defendants move to dismiss Count Six (wire fraud) and Counts Seven through Ten (mail fraud) for failure to state an offense. Count Six involves a fax transmission from defendant Schaufele to the Hubbells' lawyers. Counts Seven through Ten involve four tax notices mailed to the Hubbells by the District of Columbia Department of Finance and Revenue. The argument is that the notices and the fax could not have been "in furtherance of" the alleged fraudulent activity (evasion of taxes), because they demonstrate an attempt by the tax authorities to thwart that activity.

The indictment charges that defendants' uses of the wires and mails were "for the purpose of executing, and attempting to execute, and aiding and abetting the execution of the [alleged] scheme and artifice to defraud." Indictment, ¶ 102. Mere citation to the language of the statute does not suffice to charge fraudulent activity, *see United States v. Nance*, 533 F.2d 699, 702 (D.C. Cir. 1976), but an indictment will withstand a motion to dismiss if it sets forth the elements of the offense with sufficient factual detail to put defendants on notice of the nature of the accusation against them. *Russell v. United States*, 369 U.S. 749, 766-68 (1962). The indictment in this case meets that standard.

Defendants may be correct in their assertion that the independent counsel will have difficulty proving that the tax notices mailed by the District of Columbia were in furtherance of the alleged scheme. *See United States v. Maze*, 414 U.S. 395 (1974); *Schmuck v. United States*, 489 U.S. 705 (1989); *United States v. Pick*, 724 F.2d 297 (2nd Cir. 1983). The independent counsel avers, however, that defendants used the tax notices to keep

track of the District of Columbia government's progress in collecting the back taxes, so that they could more effectively plan the course of their evasion. Whether the evidence proves that proposition will be for the jury to decide, or perhaps will be the subject of a motion under F.R.Crim.P. 29.

The motion to dismiss Counts Six through Ten will be denied.

IV. MOTION TO DISMISS THE OMNIBUS TAX COUNT

All defendants move to dismiss Count Two, which charges a violation of the "omnibus" clause of 26 U.S.C. § 7212(a). The theory of the motion is that the Independent Counsel Reauthorization Act of 1994 requires independent counsels to comply with written policies of the Department of Justice, that the Department of Justice Manual forbids government prosecutors to charge violations of the "omnibus" clause in tax evasion cases like this one.

The short answer to this motion is that the DOJ Manual does not prohibit such a charge, but only discourages it. Department of Justice Manual, Tax Division, Tax Directive No. 77, instructs DOJ attorneys as follows:

> In general, the use of the "omnibus" provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed—typically conduct designed to impede or obstruct an audit or criminal tax investigation, when 18 U.S.C. Section 371 charges are unavailable . . . . [T]his charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct . . . [or who] continually assist[] taxpayers in the filing of false returns . . .; [or who commit] other numer-

> ous, large scale violations of [the tax code] (as it pertains to refund claims for other or fictitious taxpayers) . . . . [T]he overall purpose of Section 7212(a) . . . is to penalize conduct aimed directly at IRS personnel in the performance of their duties, and at general IRS administration of the federal tax enforcement program, but not to penalize tax evasion as such.
>
> The omnibus clause should not be utilized when other more specific charges are available and adequately reflect the gravamen of the offense . . . .

This Directive uses the precatory words "should" and "should not," and even those words are qualified by the phrase "in general." No mandatory words are used, even though the DOJ Manual is replete with directives framed in mandatory language. *See, e.g.*, Tax Division Directive No. 86-58 ("the Tax Division trial attorney shall initially contact the United States Attorney's office and discuss the case with the appropriate Assistant United States Attorney"); U.S. Attorneys Manual, Criminal Tax, § 6-4.340 ("Under no circumstances . . . will the government recommend that there be no period of incarceration"); *Id.* § 6-4.320 ("attorneys for the government must oppose acceptance of nolo contendere pleas"); *Id.* § 6-4.123 ("The U.S. Attorney must secure Tax Division approval before expanding a Title 26 grand jury investigation to include targets not authorized by the Tax Division").

The motion to dismiss Count Two will be denied.

An appropriate order accompanies this memorandum.

/s/ James Robertson
JAMES ROBERTSON
United States District Judge

Date: July 1, 1998

APPENDIX C

[Filed May 4, 1999]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3080

UNITED STATES OF AMERICA,
Appellant

v.

WEBSTER L. HUBBELL, *et al.*,
Appellees

BEFORE: Wald, Williams and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed March 12, 1999, and of the responses thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Williams would grant the petition.

APPENDIX D

[Filed May 4, 1999]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3080

UNITED STATES OF AMERICA,
Appellant

v.

WEBSTER L. HUBBELL, *et al.*,
Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Appellant's petition for rehearing en banc and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Silberman, Williams, Ginsburg and Randolph would grant the petition for rehearing *en banc*.

Circuit Judges Sentelle and Garland did not participate in this matter.

Supreme Court, U.S.
FILED
AUG 25 1999
OFFICE OF THE CLERK

(3)

No. 99-166

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District Of Columbia Circuit

BRIEF IN OPPOSITION

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22 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the government may override a witness' Fifth Amendment privilege, compel the witness to produce incriminating documents under statutory immunity, and still use those documents to build a criminal case against him.

2. Whether this Court should address that question in a case, like this one, in which the court of appeals declined to decide it in the absence of a factual record, to be developed on remand; and in which no factual record now will ever be developed because following remand the case was resolved by plea agreement.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

1. Introduction. 1

2. Facts 3

3. District Court Proceedings. 4

4. Court of Appeals Proceedings. 5

5. Proceedings Following Remand. 7

REASONS FOR DENYING THE WRIT 7

I. The Court of Appeals' Decision on the Foregone Conclusion Question Is Squarely Within this Court's Holdings in *Fisher* and *Doe* 8

II. The Court of Appeals Correctly Applied *Kastigar* 11

III. The Procedural Posture of the Case Makes It a Poor Candidate for Review 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Andresen v. Maryland, 427 U.S. 463 (1976)..... 13

Braswell v. United States, 487 U.S. 99 (1988)..... 15, 16

Doe v. United States, 487 U.S. 201 (1988) 11

In re Grand Jury Empanelled March 19, 1980, 680 F.2d 327 (3d Cir. 1982), *cert. granted sub nom. Doe v. United States*, 465 U.S. 605 (1984) 10

In re Grand Jury Proceedings on Feb. 4, 1982, 759 F.2d 1418 (9th Cir. 1985)..... 14

In re Proceedings Before Aug. 6, 1984 Grand Jury, 767 F.2d 39 (2d Cir. 1985)..... 14

In re Sealed Case, 791 F.2d 179 (D.C. Cir.), *cert. denied*, 479 U.S. 924 (1986)..... 13

In re Sealed Case, 832 F.2d 1268 (D.C. Cir. 1987)..... 9

Kastigar v. United States, 406 U.S. 441 (1972).....*passim*

Pennsylvania v. Muniz, 496 U.S. 582 (1990)..... 11

United States v. Doe, 465 U.S. 605 (1984) .....*passim*

United States v. Fisher, 500 F.2d 683 (3d Cir. 1974) 9

United States v. Fishman, 726 F.2d 125 (4th Cir. 1983)..... 10, 11

United States v. Hubbell, 167 F.3d 552 (D.C. Cir. 1999)..... 5

United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974)..... 9

United States v. Municipal Bond & Collection Servs., Inc., 810 F.2d 46 (3d Cir. 1987)..... 14

United States v. Neely, No. 94-5107, 1996 WL 60329 (4th Cir. Feb. 13, 1996)..... 14

STATUTES

18 U.S.C. § 6003 4

TREATISES

8 J. Wigmore, *Evidence* § 2264..... 9

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the District Of Columbia Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Introduction.

a. The court of appeals' opinion on the Fifth Amendment's application to document subpoenas is completely faithful to this Court's decisions in *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984). *Fisher* and *Doe* hold that the Fifth Amendment's protections apply to a subpoena for non-corporate documents unless the existence of the documents

and the witness' possession of them is a "foregone conclusion." The court of appeals concluded that to fall within the foregone conclusion exception, the government must show that it already knew of the documents' existence with "reasonable particularity," and remanded for a hearing on that issue. The court of appeals' decision on this point is extraordinarily thorough, is fully consistent with *Fisher* and *Doe*, and is at the center of gravity of the case law in other circuits. There is no reason to review it.

b. The court of appeals also properly rejected the Independent Counsel's broad position that — even when the privilege does apply — the government can *always* override the witness' claim of privilege, compel production of documents under a grant of statutory immunity, and then use those very documents to prosecute the witness. In those cases in which the witness is compelled under immunity to disclose the very existence of the documents, the Independent Counsel's position is hopelessly inconsistent with this Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), a case barely discussed at all in the petition for certiorari.

c. Moreover, the posture of this case makes it a peculiarly inappropriate vehicle for consideration of the scope and effect of an immunity order in the context of a document subpoena. The court of appeals below did not decide what the scope and effect of the immunity order was. Instead, it remanded to the district court so that it might hold a hearing, develop a factual record, and decide both the scope of Hubbell's privilege and the resulting scope and effect of the immunity order.

However, no hearing was held, no record has been made and the lower courts have not determined the scope and effect of the immunity order. Instead, the case was resolved by a plea agreement under which Mr. Hubbell pleaded to a

misdemeanor and received a sentence of no jail and no fine. Because the plea is conditional and will be set aside and all charges dismissed unless this Court grants the petition and reverses, the case is not moot. But lacking a record exploring the nature of the *testimony* involved in complying with this subpoena, this case presents a very poor vehicle for addressing the issues sought to be raised by the Independent Counsel.

2. Facts.

On October 31, 1996, at the outset of the investigation leading to the indictment in this case, the Office of Independent Counsel served a subpoena *duces tecum* on Mr. Hubbell calling for a wide range of financial and tax documents relating to himself, his sole proprietorship, and his wife and children. Fearing that the Independent Counsel would use any documents he produced to build a criminal case against him, Mr. Hubbell asserted his Fifth Amendment privilege against self-incrimination and declined to state what if any responsive documents existed. Pet. App. 25a-26a.

The Office of Independent Counsel accepted Mr. Hubbell's Fifth Amendment claim. It obtained an immunity order under 18 U.S.C. § 6003, and compelled Mr. Hubbell to produce any responsive documents under protection of immunity. Then the Independent Counsel used those documents to develop the various tax-related charges alleged in the indictment.[1]

---

1 Indeed, the Independent Counsel's office concedes here as it did below that it "made substantial use of [the documents'] contents in the investigation that led to the indictment." Pet. 4.

3. District Court Proceedings.

Contending that the indictment was based on evidence to which the Independent Counsel had been led by Mr. Hubbell's immunized testimony, Mr. Hubbell moved to dismiss the indictment. In opposing the motion in the district court, the Independent Counsel did not challenge Mr. Hubbell's Fifth Amendment privilege claim.[2] Instead, the Independent Counsel argued that it could override Mr. Hubbell's Fifth Amendment privilege with a grant of immunity and still use the documents to build a case against Mr. Hubbell. The district court rejected that argument as inconsistent with *Kastigar*, and dismissed the indictment. The district court also addressed a question not directly raised by the Independent Counsel, and found that the Independent Counsel had not shown that the existence of the "documents or their contents was a 'foregone conclusion.'" Pet. App. 134a.[3]

---

[2] Indeed, in its brief in the district court, the Office of Independent Counsel wrote:

> For purposes of this motion there is no factual dispute. Moreover, the legal dispute is limited. Both parties agree an individual can respond to a subpoena commanding business records by asserting his privilege against self-incrimination.

JA 311 (citations to "JA" refer to portions of the joint appendix in the court of appeals not included in the petitioners' appendix). *See also* JA 303.

[3] The Independent Counsel's claim in its petition that "the district court did not dispute the government's assertion that it already knew that Hubbell maintained records of the types subpoenaed" (Pet. 4) is thus incorrect.

4. Court of Appeals Proceedings.

On appeal, the Independent Counsel raised two issues. First, the Independent Counsel argued that Mr. Hubbell had enjoyed no valid Fifth Amendment privilege in the first place, because compliance with the subpoena involved no "testimony." Second, the Independent Counsel argued that he could, in any event, displace the Fifth Amendment privilege with an immunity order, and still use the documents against Mr. Hubbell.

The court of appeals addressed both issues. First, faithfully following the Supreme Court's decisions in *Fisher* and *Doe*, the court observed that the Fifth Amendment privilege applies to document subpoenas because compliance generally involves "testimony" as to existence, possession, or authenticity of the documents produced. *United States v. Hubbell*, 167 F.3d 552, 567-68 (D.C. Cir. 1999) (Pet. App. 1a, 31a-32a.) Still following *Fisher*, the court of appeals noted that where existence and possession are a "foregone conclusion," no testimony is involved. In such a case, existence and possession are a given, and the government is not relying on the witness' "truthtelling" to secure the evidence it seeks. Pet. App. 34a. The court then reviewed the prior decisions of other circuits applying the "foregone conclusion" exception, and concluded that in order to fall within the scope of that exception, the government must show that it knew with "reasonable particularity" of the existence of the subpoenaed documents and the defendant's possession of them before issuing the subpoena. Pet. App. 39a-41a; 51a-55a; 59a.

Concluding that the district court had not applied the "reasonable particularity" standard, the court of appeals

vacated the district court's order dismissing the indictment.[4] And because the record was undeveloped on the state of the Independent Counsel's pre-subpoena knowledge as to the documents' existence, the court of appeals remanded the case to the district court to conduct a hearing as to the extent of that knowledge; and directed the district court to apply the "reasonable particularity" standard to the facts as developed at that hearing. Pet. App. 23a; 71a.

Second, with respect to the scope and effect of immunity order in *this* case, the court of appeals held that the extent of its protections would turn on the nature of the *testimony* involved in Mr. Hubbell's act of producing the documents. The court of appeals reasoned that that could not be determined until the record was developed further on remand. Pet. App. 65a-66a.

The court of appeals rejected the government's broader claim that, in the document subpoena context, the government may *always* override the Fifth Amendment privilege with a grant of statutory immunity and still use the documents to prosecute the witness, so long as the jury is not told where the documents came from. The court concluded that *Kastigar* ruled that result out. Pet. App. 66a-67a. It reasoned that where the witness is compelled under immunity to reveal the *existence* of incriminating evidence, and where the government gains access to that evidence as a result, that evidence is tainted. Pet. App. 70a-71a. This follows directly from *Kastigar*, which held that a statutory immunity order must leave "'the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed

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4 The court also emphasized that the issue on remand was whether the Independent Counsel knew of the existence of the documents, not the nature of their contents. Pet. App. 36a n.23; 60a.

the Fifth Amendment privilege.'" Pet. App. 65a (quoting from *Kastigar*, 406 U.S. at 462).

The full court of appeals declined the Independent Counsel's request to rehear the case *en banc*. Pet. App. 142a.

5. Proceedings Following Remand.

Following issuance of the mandate, the case was remanded to the district court for the anticipated hearing on the question of the Independent Counsel's prior knowledge of the existence of the subpoenaed documents. Pet. App. 60a-62a.

However, the contemplated hearing never occurred. Instead, Mr. Hubbell and the Office of Independent Counsel entered into a plea agreement resolving this case as well as another one.[5] This case was resolved by a plea, which Mr. Hubbell entered to a superseding information charging a tax misdemeanor. The plea is conditional, and will be set aside and the information dismissed unless this Court grants the petition and reverses the court of appeals' decision in a way that would have permitted the Independent Counsel's office to have proceeded with its case. Pet. 8. Under the plea agreement, Mr. Hubbell received a sentence of probation with no incarceration, and no fine.

REASONS FOR DENYING THE WRIT

The court of appeals' decision on the application of the Fifth Amendment privilege to subpoenas *duces tecum* is faithful to *Fisher* and *Doe*, and consistent with circuit law interpreting those decisions. There is no reason to review that decision.

---

5 *See* Pet. at 7-8.

The court of appeals also correctly held that the scope and effect of the immunity order would depend on what testimony was involved in complying with the subpoena. This issue was to be determined on remand after a hearing was held and a factual record developed. But the case was resolved by plea; no proceedings on remand ever occurred; and the scope and effect of the immunity order thus were not determined by the courts below.

The only ruling the court of appeals made on the immunity issue was its rejection of the government's absolute position that it could always use documents produced under immunity so long as it did not disclose to the jury where they came from. But when the government learns of the *existence* of incriminating documents by compelling their disclosure under immunity, the government's position is hopelessly at odds with *Kastigar*. The court of appeals' decision rejecting it is plainly correct and warrants no further review.

I. The Court of Appeals' Decision on the Foregone Conclusion Question Is Squarely Within this Court's Holdings in *Fisher* and *Doe*

It has long been recognized that the Fifth Amendment will generally apply to a subpoena calling for a witness to produce potentially incriminating documents, or other physical evidence, because such a subpoena constitutes "process relying on [the witness'] moral responsibility for truth telling." 8 J. Wigmore, *Evidence* § 2264, at 379 (1961). As this Court explained in *Fisher*, compliance with such a subpoena may call upon the witness tacitly to testify truthfully to what documents responsive to the subpoena exist and are in his possession, and whether they are authentic. 425 U.S. at 410-11.

Compliance does not always involve testimony as to existence and possession, however. In *Fisher*, the documents had been created by accountants, who were not themselves asserting any Fifth Amendment privilege. The accountants had been interviewed by the IRS, and then *concededly* transferred their documents to the taxpayers, who in turn had *concededly* transferred them to their lawyers.[6] There was no question as to the existence of the documents or who possessed them. This Court held that existence and possession, under the facts of the case, were beyond dispute — a "foregone conclusion." And the *Fisher* Court held that where existence and possession are a foregone conclusion, compliance involves no "testimony" about what documents exist — that is already known — but solely involves surrender of the known documents. *Id.*[7]

In *Doe*, this Court held that the government may not subpoena business records from a sole proprietor over his

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6 *Fisher*, 425 U.S. at 393-94. The *Fisher* opinion dealt with two cases involving — in this respect — identical fact patterns. *See United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974); *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974).

7 In his petition for certiorari at 17, the Independent Counsel argues that *Fisher* found existence of documents to be a foregone conclusion even though the government had no specific prior knowledge of the documents' existence. This is a brand new and incorrect interpretation of *Fisher*. Indeed, in its own brief to the court below, the Independent Counsel wrote of *Fisher* that "it held that the existence of documents whose existence had been *stipulated* by the taxpayer was a 'foregone conclusion.'" *See* Appellant's Br. at 43 (emphasis added). *See also In re Sealed Case*, 832 F.2d 1268, 1280 (D.C. Cir. 1987) ("In *Fisher*, the Supreme Court found the existence and location of the taxpayers' records a foregone conclusion, but it could hardly have reached the opposite result inasmuch as the taxpayers had already *admitted* these points.")

Fifth Amendment objection; and affirmed the determination by the lower courts that the government had not sustained its burden of proving that the existence of the subpoenaed documents was a foregone conclusion. 465 U.S. at 617. The government in *Doe* argued specifically that compliance with a subpoena for standard business records is neither testimonial nor incriminating. *See* Appellees' Br. in *Doe* at 30. But this Court did not accept that argument. It sustained the application of the privilege and held that the government could only compel production with a grant of statutory immunity. 465 U.S. at 617.

Thus, in case after case, courts of appeals around the country have required the government to demonstrate particularized knowledge, or more[8], before they will find the "foregone conclusion" exception to apply. These cases are collected and analyzed exhaustively in the court of appeals' opinion below. Pet. App. 52a-55a; 59a. And the court of appeals' decision adopting the reasonable particularity standard is at the center of those other circuits' interpretations of *Fisher*, and entirely consistent with *Fisher* itself.

The Independent Counsel cites one case — *United States v. Fishman*, 726 F.2d 125 (4th Cir. 1983) — in support of its position that it may subpoena *business records* from any businessman, even if the government is without particularized knowledge as to what documents the businessman possesses. But *Fishman* was decided shortly before this Court's decision in *Doe*, and is inconsistent with the holding in *Doe*. *Doe* involved a subpoena of standard

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8 In the court of appeals in *Doe*, the Third Circuit required the government to demonstrate knowledge of existence and possession to "a certainty." *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 335 (3d. Cir. 1982), *cert. granted sub nom. Doe v. United States*, 465 U.S. 605 (1984).

business records from a businessman, and the Court sustained the privilege. *Fishman* is thus of no continuing precedential value.

There is no reason to review the court of appeals' decision regarding the foregone conclusion standard.

II. The Court of Appeals Correctly Applied *Kastigar*

Subject to the strictures of the foregone conclusion doctrine, a witness has a valid Fifth Amendment right not to disclose to the government whether a potentially incriminating document or item of physical evidence exists. This privilege applies to *oral* testimony disclosing the existence and location of an incriminating document or thing; and it applies to the *implicit* testimony involved in truthfully responding to a subpoena *duces tecum*. That is the teaching of *Fisher* and *Doe* and their progeny.[9]

If the government wishes to compel the witness, over a claim of privilege, to inform it of the existence of such an incriminating object or document so that the government may obtain possession of it, the government must provide the witness immunity. *See Doe*, 465 U.S. at 617. And if the government compels the witness under *immunity* to provide it with access to the document or object, the immunity statute will forbid the government from using the document or

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9 *See also Doe v. United States*, 487 U.S. 201, 209-10 n.8 (1988) ("Petitioner has articulated no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements"); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (definition of testimonial communication "applies to both verbal and nonverbal conduct").

object against the witness. That is the law of immunity and the teaching of *Kastigar*.

In arguing the contrary, the Office of Independent Counsel makes hardly any mention of *Kastigar* at all; and finds itself adopting the fanciful suggestion that a prosecutor should be able to use the documents to the same extent as "if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven." Pet. 7. But the documents in this case did not appear in the grand jury like manna from heaven. Instead, Mr. Hubbell had them in his custody and — depending on the outcome of the hearing on remand — had a Fifth Amendment right not to inform the government whether he had them or not. The documents arrived in the grand jury because Mr. Hubbell's Fifth Amendment privilege was overridden by an order of statutory immunity — not by act of God. Without the immunity order, and Mr. Hubbell's truthful response — a response given only under immunity, acknowledging that he had the documents — the Independent Counsel and the grand jury would not have had access to the documents. *Kastigar* forbids their use under these circumstances to build a case against Mr. Hubbell.[10]

The Independent Counsel reasons that Mr. Hubbell was not compelled to write the documents, and that the

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10 The Independent Counsel asserts that, had the case proceeded to trial, he would have needed neither to introduce the subpoenaed documents into evidence nor to establish their existence or possession by Mr. Hubbell to prove the charges in the indictment. *See* Pet. at 10, 12-15. This, of course, is utterly irrelevant. Both the Fifth Amendment and the immunity statute prohibit *any* use of compelled testimony or its fruits to build a case against an accused — not merely such use at trial.

contents of the documents are therefore not "privileged."[11] This is true enough; but this reasoning does not get the Independent Counsel very far. As the court of appeals for the D.C. Circuit said in *In re Sealed Case*, 791 F.2d 179 (D.C. Cir.) (Scalia, J.), *cert. denied*, 479 U.S. 924 (1986):

> The flaw in this reasoning is that the fact that the contents of the tapes are *unprivileged* does not mean that they will necessarily remain *untainted*. If the government prosecutes the [witness] in the future, it will have to meet the 'heavy burden,' *Kastigar*, 406 U.S. at 461, of proving that all evidence it seeks to introduce is untainted by the immunized act of production.

791 F.2d at 182 (emphasis in original).

Justice Scalia's point is both simple and incontrovertible. Under the immunity statute and *Kastigar*, protection is given to more than just the privileged testimony itself. Protection is given, as it must be, to other evidence (including physical evidence) which is not itself "privileged," but to which the government is led by the compelled testimony.

Thus, if a witness were compelled to give testimony under immunity disclosing the whereabouts of a body, a

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11 The proposition that *contents* of documents are not privileged is an important one. It means that a person's writings are subject to seizure by warrant issued on probable cause (that is the holding of *Andresen v. Maryland*, 427 U.S. 463 (1976)); and that a person's writings may be subpoenaed from a third party (that is the holding of the first part of *Fisher v. United States*, 425 U.S. 391, 396-401 (1976)).

murder weapon, or an incriminating document, the prosecution would be forbidden from using these items of evidence against the witness, unless it could prove that it was led to them by a legitimate independent source. This is true not because these items are "privileged"; they are not. It is true because they would be *tainted* by the compelled testimony. These items constitute evidence *derived from* the immunized testimony within the meaning of *Kastigar*.[12]

The Independent Counsel nonetheless cites one circuit court decision that could be said to conflict with the decision of the court below. *United States v. Neely*, No. 94-5107, 1996 WL 60329 (4th Cir. Feb. 13, 1996). But the *Neely* case is an unreported decision, and it does not even discuss *Kastigar*. The Independent Counsel cites three other cases, but none conflicts. One involves corporate documents as to which there is no Fifth Amendment privilege[13]; and two do not involve the question what use can be made of items produced under immunity at all.[14]

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12 The fact that a document was written voluntarily *prior* to the subpoena is largely irrelevant to the analysis. All tainted physical evidence pre-exists the testimony that led the government to that evidence. The evidence becomes tainted not because the government forced the witness to create it, but because the government compelled the witness to disclose its existence or lead the government to it.

13 *United States v. Municipal Bond & Collection Servs., Inc.*, 810 F.2d 46 (3d Cir. 1987).

14 *In re Proceedings Before the Aug. 6, 1984 Grand Jury*, 767 F.2d 39 (2d Cir. 1985) (holding that non-corporate records must be produced when immunity is conferred; not addressing question of their later use); *In re Grand Jury Proceedings on Feb. 4, 1982*, 759 F.2d 1418, 1420 (9th Cir. 1985) (immunity not involved at all).

III. The Procedural Posture of the Case Makes It a Poor Candidate for Review

It is true beyond doubt that *Kastigar*'s prohibition on use of evidence directly or indirectly derived from immunized testimony applies in the context of the immunized production of documents. This Court made that clear in *Braswell v. United States*, 487 U.S. 99 (1988). Referring specifically to document subpoenas, the Court said:

> All of the evidence obtained *under a grant of immunity* to the custodian may of course be used freely against the corporation, but if the Government has any thought of prosecuting the custodian, a grant of act of production *immunity* can have serious consequences. Testimony obtained pursuant to a grant of *statutory use immunity* may be used neither directly or derivatively. 18 U.S.C. § 6002; *Kastigar v. United States*, 406 U.S. 441 (1972). And "[o]ne raising a claim under [the federal immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Id.* at 461-62.

Id. at 117 (emphasis added).

Since the *Braswell* Court held that the Fifth Amendment did not apply at all to the corporate documents at issue there, it had no occasion to adjudicate the precise effect of an immunity order on their production. It stands to

reason, however, that the scope of the immunity will turn on the nature of the testimony implicit in complying with the subpoena. Here, because there was no hearing on remand and no record made with respect to the foregone conclusion issue, it has never been determined whether Mr. Hubbell was compelled to disclose the very existence of the documents or whether, instead, the Independent Counsel already knew about them.

The court of appeals accordingly did not determine the effect of the immunity order. It explicitly left that issue open until the district court could determine on remand what the nature of the compelled testimony was: did Mr. Hubbell testify to the existence and his possession of the documents, just their authenticity, or neither?

However, because the Independent Counsel and Mr. Hubbell entered into a plea agreement, no hearing was held. No record was made. Thus, no decision on the effect of the immunity was reached by the lower courts.

The posture of this case makes it a poor candidate for review.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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AUGUST 25, 1999

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No. 99-166

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Although the brief in opposition largely ignores the main arguments set forth in our petition, we reply briefly to clarify the issues before the Court.

1. Respondent's principal rhetorical point (Br. in Opp. 11-14) is that the petition in some way ignores or fails to account for this Court's holding in *Kastigar v. United States*, 406 U.S. 441 (1972). He is wrong. The first three paragraphs of the Reasons for Granting the Petition address *Kastigar* directly. Specifically, we noted the tension in this Court's jurisprudence between *Kastigar*, on the one hand, and *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984), on the other hand. As the petition explains (and as the response illustrates), respondent—and the court of appeals

—view *Kastigar* as requiring a sweeping, absolute immunity that bars any use of the contents of documents produced to the government under compulsion. In our view, the logic of *Schmerber v. California*, 384 U.S. 757 (1966), coupled with the post-*Schmerber* statements in *Fisher* and *Doe* with respect to the limited constitutional protection for the contents of voluntarily recorded documents, indicates that the Constitution necessarily permits that use (at least in cases, like this one, in which the government need not establish the existence or authenticity of the documents or the defendant's possession of them). The tension that led to the lower court's misunderstanding of those cases arises directly out of the interplay among this Court's decisions; the tension can be resolved only by this Court's intervention.

2. Respondent also suggests (Br. in Opp. 15-16) that the procedural posture of the case renders it a poor vehicle for review, apparently because "there was no hearing on remand and no record made with respect to the foregone conclusion issue" (Br. in Opp. 16). Respondent is mistaken; the posture of the case in fact strongly favors review. The plea agreement into which the parties entered after remand crystallizes the case into purely legal questions, because it renders any subsidiary factual questions definitively irrelevant to the disposition of the case.*

At bottom, under the standard articulated by the panel majority, the government could not practicably continue

* The technically interlocutory status of the case does not undermine the Court's jurisdiction nor, given the practical finality wrought by the plea agreement, does it even counsel against review now. *See generally* R. STERN ET AL., SUPREME COURT PRACTICE § 4.18, at 196 (7th ed. 1993) (explaining that certiorari jurisdiction regularly has been exercised in non-final cases when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari").

with this prosecution. The reason is this: We readily concede that the government could not make a case against respondent without use of the contents of the documents he delivered to us. Conversely, Hubbell's agreement to enter a conditional plea reflects the reality that under the standard we urge his guilt would be so readily established that he should plead guilty and submit to punishment for some portion of the criminal conduct alleged in the indictment.

This is, in short, a case in which the questions presented by the petition are indisputably outcome-determinative. In consequence, there can be no doubt that the petition presents a controversy of the type appropriate for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1999

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(9)

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 26, 1999
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120 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries (*U.S. v. Hubbell, et al.*, Cr. No. 98-151)	1
Indictment, filed April 30, 1998 (Record 1)	9
Exhibits to Memorandum in Support of Motion of Defendant Webster Hubbell to Dismiss or for a *Kastigar* Hearing, filed May 29, 1998 (Record 18)	45
Grand Jury Subpoena Duces Tecum Issued to Webster Hubbell, dated October 31, 1996	46
Letter from Deputy Independent Counsel John D. Bates to John W. Nields, Jr., dated November 8, 1996	54
Letter from John W. Nields, Jr., to Deputy Independent Counsel John D. Bates, dated November 12, 1996	57
Order Compelling Production of Documents, *In re: Grand Jury Proceedings*, No. GJ-96-3 (E.D. Ark. Nov. 14, 1996)	60
Grand Jury Testimony of Webster Lee Hubbell, dated November 19, 1996	62
Order of Referral, *In re: Madison Guaranty Savings & Loan Assn.*, (D.C. Cir. [Spec. Div.] Jan. 6, 1998)	71
Transcript of Motions Hearing, dated June 26, 1998 (Record 48)	74
Plea Agreement, filed June 30, 1999 (Record 60)	104

TABLE OF CONTENTS—Continued

NOTE

The Opinions Below are Reproduced in the Appendix to the Petition for a Writ of Certiorari, as follows:

	Page
Appendix A—Opinion of the United States Court of Appeals for the District of Columbia Circuit (Jan. 26, 1999)	1a
Appendix B—Opinion of the United States District Court for the District of Columbia (July 1, 1998)	113a
Appendix C—Order of the United States Court of Appeals for the District of Columbia Circuit, denying petition for rehearing (May 4, 1999)	141a
Appendix D—Order of the United States Court of Appeals for the District of Columbia Circuit, denying suggestion for rehearing en banc (May 4, 1999)	142a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON)

CASE #: 98-CR-151

USA

v.

HUBBELL, *et al.*

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
4/30/98	1	INDICTMENT filed against WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10, MICHAEL C. SCHAUFELE (3) count(s) 1, 2, 3, 5, 6-10, CHARLES OWEN (4) count(s) 1, 2, 3, 6-10 (erd) [Entry date 05/12/98]
5/29/98	18	MOTION filed by WEBSTER L. HUBBELL, SUZANNA W. HUBBELL to dismiss indictment or for a Kastigar Hearing as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10; Attachments 6. (erd) [Entry date 06/02/98]
6/16/98	37	RESPONSE by USA in opposition to motion to dismiss indictment or for a Kastigar Hearing as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10 [18-1] by defendant. (erd) [Entry date 06/19/98]

DATE		PROCEEDINGS
6/23/98	39	REPLY MEMORANDUM by WEBSTER L. HUBBELL in support of motion to dismiss or for a Kastigar Hearing [18-1] by defendant (blj) [Entry date 06/25/98]
6/26/98	—	MOTION HEARING before Judge James Robertson as to WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, CHARLES OWEN: Taken under advisement motion to compel disclosure of application for jurisdiction [25-1] as to WEBSTER L. HUBBELL (1), SUZANNA W. HUBBELL (2), MICHAEL C. SCHAUFELE (3), CHARLES OWEN (4), taken under advisement motion to strike prejudical surplusage from the indictment [21-1] as to WEBSTER L. HUBBELL (1), SUZANNA W. HUBBELL (2), MICHAEL C. SCHAUFELE (3), CHARLES OWEN (4), taken under advisement motion to dismiss indictment as violation of 28 U.S.C. 594(f)(1) as to WEBSTER L. HUBBELL (1) count(s) 2, SUZANNA W. HUBBELL (2) count(s) 2 [20-1] as to WEBSTER L. HUBBELL (1), SUZANNA W. HUBBELL (2), taken under advisement motion to dismiss indictment on the ground that it is outside the jurisdiction of the Independent Counsel as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10 [19-1] as to WEBSTER L. HUBBELL (1), taken under advisement motion to dismiss indictment or for a Kastigar Hearing as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10 [18-1] as to WEBSTER L. HUBBELL (1), SUZANNA W. HUBELL (2). Government motion

DATE		PROCEEDINGS
		for leave to file certain documents under seal, heard and granted. Defendant continued on PR bond. Reporter: Dennis Dinkel (su) [Entry date 07/13/98]
6/30/98	48	TRANSCRIPT filed as to WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, CHARLES OWEN for date of 6/26/98. Reporter: Dennis A. Dinkel (ks) [Entry date 06/30/98]
7/1/98	49	MEMORANDUM OPINION by Judge James Robertson as to WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, CHARLES OWEN (N) (erd) [Entry date 07/01/98]
7/1/98	50	ORDER by Judge James Robertson as to WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, CHARLES OWEN: granting motion to dismiss indictment on the ground that it is outside the jurisdiction of the Independent Counsel as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2), count(s) 1, 2, 3, 6-10 [19-1], as to WEBSTER L. HUBBELL (1). That defendant Webster L. Hubbell's motion to dismiss the indictment as violative of an immunity order entered by the United States District Court for the Eastern District of Arkansas [18] is granted. That defendants' joint motion to dismiss counts six through ten for failure to state an offense [23] is denied. That the defendant's joint motion to dismiss count two as violative of the independent counsel reauthorization act of 1994 [20] is denied. (N) (erd) [Entry date 07/01/98]
7/7/98	51	NOTICE OF APPEAL filed by USA from Court's order filed 7/1/98 and docketed 7/

DATE		PROCEEDINGS
		1/98. Counsel and Defendant(s) notified. Docketing statement: not received. NO FEE: GOVT. (erd) [Entry date 07/07/98] [Edit date 08/13/98]
6/30/99	58	SUPERSEDING INFORMATION filed against WEBSTER L. HUBBELL (1) count(s) 1s. (hsj) [Entry date 07/06/99]
6/30/99	—	ARRAIGNMENT held before Judge James Robertson as to WEBSTER L. HUBBELL (1) count(s) 1s: Attorney appearance for WEBSTER L. HUBBELL by, John Nields. Plea guilty entered by WEBSTER L. HUBBELL (1) count(s) 1s, a misdemeanor. Motion of government to dismiss defendants #2, 3 and 4, heard and granted. Defendant on probation. Reporter: Dennis Dinkel (hsj) [Entry date 07/21/99]
6/30/99	—	SENTENCING by Judge James Robertson for WEBSTER L. HUBBELL (1) count(s) 1s. Defendant sentenced to one (1) year probation to run concurrently to the term of probation imposed in Criminal Case Number 98-394; Special Assessment of $25.00 imposed. Defendant on probation. Court Reporter: Dennis Dinkel (hsj) [Entry date 07/21/99]
6/30/99	60	PLEA AGREEMENT filed as to WEBSTER L. HUBBELL. (hsj) [Entry date 07/21/99]
7/1/99	61	JUDGMENT and Probation Order issued by Judge James Robertson as to WEBSTER L. HUBBELL, with Statement of Reasons. (hsj) [Entry date 07/21/99]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3080

U.S.A.

v.

WEBSTER L. HUBBELL, *et al.*

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/7/98	CRIMINAL CASE docketed. Notice of Appeal filed by Appellant USA. [364790-1] (jth)
8/24/98	BRIEF filed by Appellant USA [377381-1]. Copies: 15. Certificate of service date 8/24/98. (jth)
8/24/98	JOINT APPENDIX filed [377387-1]. Copies: 10. Certificate of service date 8/24/98. (jth)
9/18/98	BRIEF LODGED by Amicus Curiae for Appellant USA (Acting Through the Attorney General) [383522-1]. Copies: 15. Certificate of service date 9/18/98. (jth)
9/18/98	MOTION filed (5 copies) by Amicus Curiae for Appellant USA, Acting Through the Attorney General (certificate of service dated 9/18/98) to file brief as amicus curiae [383524-1], and to exceed the word limit [383524-2]. (jth)
9/23/98	PER CURIAM ORDER filed granting appellees' motion to file a motion to exceed the limits on

DATE	PROCEEDINGS
	length of brief out of time; Clerk directed to file the lodged motion; Granting motion to exceed the limits on length of brief; Appellees brief, not to exceed 15,000 words, due by 9/24/98; Granting motion to file an amicus curiae brief for the US through the Attorney General and to exceed the word limits; Clerk directed to file the lodged brief of amicus curiae. [383530-1] [383529-1] [383524-1] [383524-2] [383522-1] Before Judges Wald, Tatel. (cwc)
9/23/98	PER ABOVE ORDER lodged brief of amicus curiae filed [383522-1]. (cwc)
9/24/98	BRIEF filed by Appellee's Webster Hubbell, Suzanna Hubbell, Michael Schaufele, and Charles Owen [384662-1]. Copies: 15. Certificate of service date 9/24/98. (jth)
10/8/98	REPLY BRIEF filed by Appellant USA [388234-1]. Copies: 15. Certificate of service date 10/8/98. (jth)
10/21/98	ORAL ARGUMENT HELD before Wald, Williams, Tatel . (sgh)
10/27/98	TRANSCRIPT of oral argument held on 10/21/98. [364772-1] (jth)
1/26/99	JUDGMENT for the reasons in the accompanying opinion reversing [411798-1] & remanding case to the USDC [411798-2]. Before Judges Wald, Williams, Tatel. (edb)
1/26/99	OPINION (64 pgs) for the Court filed PER CURIAM, CONCURRING IN PART I OPINION (4 pags) filed by Judge Wald, DISSENTING IN PART I OPINION (20 pgs) filed by Judge Tatel, DISSENTING IN PART II OPINION (12 pgs filed by Judge Williams. (edb)
1/27/99	PER CURIAM ORDER filed amending Per Curiam opinion filed 1/26/99, page 8, dissenting opinion

DATE	PROCEEDINGS
	filed by Circuit Judge Williams. (SEE ORDER FOR DETAILS) [411805-4]. Before Judges Wald, Williams, Tatel. (edb)
3/12/99	PETITION for rehearing [422430-1], PETITION for rehearing in banc [422430-2], (20 copies) filed by Appellant USA (certificate of service dated 3/12/99). (jth)
3/16/99	CLERK'S ORDER filed directing appellees to respond to the petition for rehearing and petition for rehearing en banc and to do so on or before March 31, 1999 [422430-1]. The United States as Amicus Curiae is invited to file a response on or before March 31, 1999. A reply to the response will not be accepted by the court. (jth)
4/7/99	RESPONSE filed [427861-1] by Appellee Webster L. Hubbell (certificate of service dated 4/7/99) to the petition for rehearing and petition for rehearing in banc. (jth)
4/7/99	RESPONSE filed [427877-1] (5 copies) by Amicus Curiae for Appellant (USA) to the petition for rehearing, petition for rehearing in banc. (certificate of service dated 4/7/99). (jth)
5/4/99	PER CURIAM ORDER filed denying appellant's petition for rehearing [422430-1] filed March 12, 1999. (Mandate may issue on or after 5/12/99). Before Judges: Wald, Williams, Tatel. (Circuit Judge Williams would grant the Petition). (jth)
5/4/99	PER CURIAM ORDER In Banc, filed denying the petition for rehearing en banc [422430-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland. (Circuit Judges Silberman, Williams, Ginsburg and Randolph would grant the

DATE	PROCEEDINGS
	Petition for Rehearing En Banc). (Circuit Judges Sentelle and Garland did not participate in this matter). (jth)
5/18/99	MANDATE ISSUED to Clerk, District Court [436614-1] Awaiting rehearing petition cancelled. (edb)

[Filed in Open Court Apr. 30, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 98-0151

UNITED STATES OF AMERICA

v.

WEBSTER L. HUBBELL, SUZANNA W. HUBBELL,
MICHAEL C. SCHAUFELE, and CHARLES C. OWEN,
Defendants

VIOLATIONS:

Count 1—Conspiracy
(18 U.S.C. § 371)

Count 2—Impede and Impair the IRS
(26 U.S.C. § 7212(a))

Count 3—Tax Evasion
(26 U.S.C. § 7201)

Counts 4-5—Aid in Preparing False Return
(26 U.S.C. § 7206(2))

Counts 6-10—Mail and Wire Fraud
(18 U.S.C. § 1341, 1343 and 2)

INDICTMENT

THE GRAND JURY CHARGES:

INTRODUCTION

1. WEBSTER L. HUBBELL was an attorney at the Rose Law Firm in Little Rock, Arkansas. In 1993, he became Associate Attorney General at the Department of Justice.

2. In 1994, WEBSTER L. HUBBELL resigned from the Department of Justice. In late 1994, WEBSTER L. HUBBELL pled guilty in connection with his fraudulent billing during 1989-1992 of almost $400,000 at the Rose Law Firm.

3. The fraudulent billing resulted in additional income that WEBSTER L. HUBBELL and his wife, SUZANNA W. HUBBELL, did not report on their state and federal tax returns. This additional unreported income, in turn, created additional tax due.

4. In addition to owing taxes, interest and penalties for 1989-1992, the HUBBELLs did not pay a substantial portion of their tax liabilities for 1994 and 1995.

5. Beginning in 1995, the Internal Revenue Service, the State of Arkansas, and the District of Columbia took steps to collect the HUBBELLs' delinquent taxes. By late 1997, the taxes, interest and penalties for 1989-1992, 1994, and 1995 exceeded $894,000.

6 a. During 1994 through 1997, WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE (a certified public accountant and HUBBELL friend), and CHARLES C. OWEN (an attorney and HUBBELL friend), and others, took various steps to conceal the HUBBELLs' income, and to impede the

ascertainment, assessment, and collection efforts of certain creditors, including the Internal Revenue Service (IRS), the State of Arkansas, the District of Columbia, and the Rose Law Firm. These steps included, but were not limited to, the following:

b. Between 1994 through 1997, WEBSTER L. and SUZANNA W. HUBBELL had income in excess of one million dollars, but made only modest tax payments to the Internal Revenue Service toward paying their 1989-1992, 1994 and 1995 tax liabilities.

c. During the same period, the HUBBELLs spent over $750,000 on personal items. The HUBBELLs liquidated assets and spent down their funds which reduced the amount of money available to the IRS and other government creditors.

d. MICHAEL C. SCHAUFELE prepared and filed false federal tax returns for the HUBBELLs for 1994, 1995, and 1996, which understated income and tax.

e. MICHAEL C. SCHAUFELE, assisted by CHARLES C. OWEN, created and used bank accounts which assisted the HUBBELLs in concealing funds from the Internal Revenue Service and other creditors.

f. SUZANNA W. HUBBELL and CHARLES C. OWEN provided false and incomplete financial information to the IRS to conceal the existence of a bank account and to conceal the existence of trusts of which the HUBBELLs were beneficiaries.

g. CHARLES C. OWEN created a company called Bridgeport Group, LLC (Bridgeport), and assisted MICHAEL C. SCHAUFELE in setting up a Bridgeport bank account to conceal funds from and impede the ascertainment, assessment, and collection efforts of the

IRS, the State of Arkansas, the District of Columbia and the Rose Law Firm.

7. Through these and other efforts, the HUBBELLs attempted to impede and impair these creditors and pay substantially less money than they owed and were able to pay.

GENERAL ALLEGATIONS

8. From in or about 1973 through in or about 1992, WEBSTER L. HUBBELL was an attorney in the Rose Law Firm of Little Rock, Arkansas.

9. In or about January 1993, WEBSTER L. HUBBELL began his employment with the United States Department of Justice.

10. In or about May 1993, WEBSTER L. HUBBELL was confirmed as an Associate Attorney General at the Department of Justice.

11. In or about March 1994, WEBSTER L. HUBBELL announced his resignation from the Department of Justice, which took effect in April 1994.

12. In or about March 1994, there was a meeting at the White House, at which was discussed the issue of whether WEBSTER L. HUBBELL should resign due to allegations concerning HUBBELL's possible over billing of the Rose Law Firm and its clients while he worked there. Subsequently, one or more individuals suggested that efforts be taken to assist WEBSTER L. HUBBELL in obtaining work.

13. At the time WEBSTER L. HUBBELL resigned from the Department of Justice, the Rose Law Firm had already started examining HUBBELL's prior billing practices at the Firm. The Rose Law Firm started its inquires in approximately Spring 1993, and continued to make in-

quiries of HUBBELL concerning possible fraudulent billing of personal expenses to clients and the Firm.

14. In or about May 1994, a Special Prosecutor served WEBSTER L. HUBBELL with a federal grand jury subpoena commanding HUBBELL to produce certain financial information, including tax return information and information relating to his billing practices.

15. Beginning in or about April 1994, WEBSTER L. HUBBELL commenced holding himself out as a consultant. From April 1994, through December 1994, HUBBELL received approximately $450,010 in connection with his "consulting" business. He only reported approximately $376,075 of these payments on his federal tax return. WEBSTER L. HUBBELL made zero estimated tax payments to the IRS concerning his 1994 consulting income and zero tax payments with his 1994 return.

16. Approximately 15 clients paid WEBSTER L. HUBBELL consulting income in 1994. The fees ranged between $5,000 and $100,000. WEBSTER L. HUBBELL performed little or no work for some of these payments. The payors of these fees included Hong Kong China Limited ($100,000), Revlon ($62,775), and others.

17. In or about September 1994, the Office of the Independent Counsel notified WEBSTER L. HUBBELL that it could prove HUBBELL had intentionally falsely billed in excess of $350,000 to the Rose Law Firm and/or certain of its clients. The Office of the Independent Counsel further advised WEBSTER L. HUBBELL that his anticipated additional tax liability for 1989-1992 would be substantial and in excess of $100,000.

18. On December 6, 1994, WEBSTER L. HUBBELL pled guilty to a two-count Criminal Information filed in

the United States District Court for the Eastern District of Arkansas in Little Rock, Arkansas, charging him with one count of willful tax evasion for 1992 and one count of mail fraud concerning the fraudulent billing of approximately $394,000 between 1989-1992, and the failure to include that money as income. *United States v. WEBSTER HUBBELL*, No. LR-CR-94-241, United States District Court, Eastern District of Arkansas, Western Division.

19. In or about December 1994 through January 1995, WEBSTER L. HUBBELL and MICHAEL C. SCHAUFELE executed three trust agreements designating SCHAUFELE as trustee. MICHAEL C. SCHAUFELE was a resident of Little Rock, Arkansas, a Certified Public Accountant (CPA), and a partner at L. Cotton Thomas & Company. SCHAUFELE was a long-time friend of WEBSTER L. HUBBELL.

a. The first trust agreement, executed on or about December 30, 1994, was titled the Webster Hubbell Legal Expense Trust.

b. The second trust agreement, executed on or about January 19, 1995, was titled the Hubbell Children's Education Trust.

c. The third trust agreement, executed on or about January 19, 1995, was titled the Hubbell Family Support Trust.

20. On or about January 24, 1995, MICHAEL C. SCHAUFELE opened three non-interest bearing bank accounts at Metropolitan National Bank, Little Rock, Arkansas.

a. One account was styled, "WEBSTER HUBBELL Legal Expense Trust, MICHAEL C. SCHAUFELE, Trustee."

b. A second account was styled, "HUBBELL Children's Education Trust, MICHAEL C. SCHAUFELE Trustee."

c. A third account was styled "HUBBELL Family Support Trust . . . MICHAEL C. SCHAUFELE Trustee."

21. The signatories on these accounts were SCHAUFELE and his secretary. In some instances, SCHAUFELE transferred funds into his interest-bearing account.

22. Under the terms of the Children's Education Trust agreement, money contributed to the trust was to be used for the HUBBELL children's education. In some instances, funds were transferred from the Education Trust account to another account SCHAUFELE opened in 1996, and were then spent on living expenses for WEBSTER L. and SUZANNA W. HUBBELL.

23. On June 28, 1995, HUBBELL was sentenced on his two-count Criminal Information by the Honorable George Howard, Jr., Senior Judge, United States District Court, Eastern District of Arkansas, to 21 months' incarceration.

24. Prior to reporting to federal prison, WEBSTER L. HUBBELL wrote a handwritten sheet which purported to list all of his consulting income by client when in fact it only listed some of his income. The sheet also listed purported business expenses. HUBBELL failed to include income received from five clients, which totaled approximately $74,000. WEBSTER L. HUBBELL provided this hand-written sheet to MICHAEL C. SCHAUFELE for SCHAUFELE's use in preparing WEBSTER L. and SUZANNA W. HUBBELL's 1994 joint individual income tax return, Form 1040. SCHAUFELE had prepared the HUBBELLs' tax returns for a number of years.

25. In or about August 1995, pursuant to the obligations of the Plea Agreement, WEBSTER L. HUBBELL filed, and caused to be filed, Amended U.S. Individual Income Tax Returns for the years 1989-1992.

26. As reported on the amended federal returns, the unreported income from HUBBELL's embezzlement resulted in additional tax, exclusive of interest and penalties of,

1989 — $25,403.00;

1990 — $37,552.00;

1991 — $66,529.00; and,

1992 — $48,476.00.

Total — $177,960.00.

27. The HUBBELLs made no tax payments with the amended federal tax returns, despite having substantial cash available.

28. On or about August 7, 1995, WEBSTER L. HUBBELL reported to the Federal Correctional Institution in Cumberland, Maryland to begin serving his sentence.

29. On or about October 2, 1995, WEBSTER L. HUBBELL caused SCHAUFELE to prepare and file Amended Arkansas tax returns for 1989, 1990, 1991, 1992, and a nonresident Arkansas tax return for 1994.

The returns reported additional tax due of:

1989 — $ 5,503,

1990 — $ 8,322,

1991 — $14,753,

1992 — $10,510, and

1994 — $ 1,742

Total — $40,830.

The HUBBELLs did not make any payments on these additional tax liabilities.

30. On or about October 18, 1995, WEBSTER L. HUBBELL filed, and caused to be filed, a false and fraudulent joint U.S. Individual Income Tax Return, Form 1040, for the calendar year 1994. The return was signed by SUZANNA W. HUBBELL on behalf of WEBSTER L. HUBBELL and herself. This tax return reported Schedule C gross income from WEBSTER L. HUBBELL's "consulting" business of $376,075. This Schedule C tax return failed to report "consulting" income from certain clients of approximately $74,000. This Schedule C and tax return also overstated certain business expenses by claiming as business expenses certain personal travel expenses for HUBBELL's wife and children to various locations including Greece and the Gulf Coast of Florida.

31. WEBSTER L. and SUZANNA W. HUBBELL reported total tax on the 1994 return of $141,432. The HUBBELLs made no tax payments with the tax return. The only tax applied to the 1994 return was $1,434 withheld from the W-2 wages of SUZANNA W. HUBBELL at the United States Department of the Interior, $7,111 withheld from the W-2 wages of WEBSTER L. HUBBELL at the Department of Justice prior to his April 1994 resignation, and $577 withheld from a gross distribution of the Thrift Savings Plan of WEBSTER L. HUBBELL, for a total of $9,122. WEBSTER L. and SUZANNA W. HUBBELL made no estimated or any other tax payments toward their joint 1994 additional tax due and owing of $136,345.

32. In order to extend the filing deadline for the 1994 federal tax return beyond April 15, 1995, SCHAUFELE's accounting firm filed an extension application, Form 4868. The extension application listed the estimated tax liability as $40,000. The HUBBELLs did not include the required payment with the extension application. The extension expired on August 15, 1995. The HUBBELLs filed their 1994 return on or about October 18, 1995.

33. The HUBBELLs made no estimated payments on their 1994 tax liability, did not make any payments when they applied for extensions, and did not include any payments when they actually filed the 1994 return. WEBSTER L. and SUZANNA W. HUBBELL received substantial income during 1994 and 1995 from which they could have made payments to the Internal Revenue Service to reduce their 1989-1992 and 1994 tax liabilities.

1994 INCOME

34. During 1994, the HUBBELLs received income from several sources.

a. WEBSTER L. HUBBELL received gross income (before expenses) in 1994 from "consulting" totaling approximately $450,010.00. The consulting income derived from 15 sources, including, but not limited to,

1. Hong Kong China Limited (Riady)—$100,000.00,

2. Revlon — $62,775.00.

WEBSTER L. HUBBELL's net consulting income was approximately $405,919.95.

b. WEBSTER L. HUBBELL also received income from the withdrawal of pension and annuity funds from the ROSE LAW FIRM of approximately $41,886.00 in 1994.

c. WEBSTER L. HUBBELL also received wages in 1994 from the Department of Justice prior to his resignation of $39,634.00.

d. WEBSTER L. HUBBELL also received 1994 interest income of $13,099.00 and dividend income of $20.00.

e. WEBSTER L. HUBBELL also received capital gains in 1994 of approximately $16,957.00.

f. SUZANNA W. HUBBELL received wages from the Department of the Interior in 1994 of $13,899.00.

The HUBBELLs' total 1994 income was approximately $531,414.95.

1995 INCOME

35. During 1995, the HUBBELLs received income from several sources.

a. WEBSTER L. HUBBELL received consulting and book income, after expenses, in 1995 of approximately $95,175.00.

b. WEBSTER L. HUBBELL received pension and annuity income in 1995 of $184,311.00.

c. WEBSTER L. HUBBELL received capital gain and interest income in 1995 from the payoff of an installment sale of a warehouse of approximately $83,128.26.

d. SUZANNA W. HUBBELL received wages in 1995 of $46,988. The HUBBELLs' total 1995 income was $409,602.26.

36. During 1995, the HUBBELLs again made no estimated tax payments on their 1995 anticipated tax liability, and made no tax payment when they filed their return. The HUBBELLs also made no payments to reduce their 1989-1992 and 1994 federal tax liabilities.

37. Commencing in or about November 1995, the Internal Revenue Service began sending notices regarding the HUBBELLs' tax liabilities. For example:

a. On or about November 20, 1995, the Internal Revenue Service sent a notice regarding the 1994 return and the failure to make any payments on the tax liability (including interest and penalty) of $167,562.80.

b. On or about December 11, 1995, the Internal Revenue Service sent notices regarding the 1989, 1990, 1991, and 1992 tax liabilities.

c. In or about January 1996, notices of intent to levy were sent regarding 1989-1992 taxes, interest, and penalties: 1992—$107,927.23; 1991—$156,416.96; 1990—$98,028.18; and 1989—$74,415.90.

38. In or about February 1996, the HUBBELLs received a notice concerning the tax liability the HUBBELLs owed to the District of Columbia for the year 1994, in the amount of $40,033.60. The District of Columbia notice was also provided to SCHAUFELE who then provided a copy to CHARLES C. OWEN. OWEN was an attorney in Little Rock, Arkansas, and was a long-time friend of WEBSTER L. HUBBELL.

39. In or about early February 1996, the HUBBELLs, OWEN and SCHAUFELE executed a Power of Attorney to represent the HUBBELLs with respect to their outstanding tax liabilities.

40 a. Because the defendants were concerned about the HUBBELLs' bank accounts being frozen or SUZANNA W. HUBBELL's wages being garnished, on or about February 8, 1996 OWEN contacted the William Morris Agency and requested on behalf of the HUB-

BELLs that William Morris Agency establish an escrow account for an upcoming payment that was to be made to WEBSTER L. HUBBELL pursuant to a book contract he had entered into with Harper Collins Publishers dated September 28, 1995. OWEN and the HUBBELLs requested that William Morris Agency put the book advance money into an interest-bearing account and disburse the funds only at the direction of WEBSTER L. or SUZANNA W. HUBBELL. OWEN confirmed this request by a letter dated February 15, 1996. William Morris Agency did not agree to set up the requested escrow account.

40 b. On February 26, 1996, the IRS recorded a Notice of Federal Tax Lien in Washington, D.C. The Notice was for an unpaid balance of $105,664.94 for the HUBBELLs' 1992 tax liability.

41 a. In or about April 1994, John Phillips, a friend of WEBSTER L. HUBBELL's recommended that the Consumer Support and Education Fund (CSEF) hire HUBBELL to write a series of articles on public service, for which HUBBELL was to be paid $45,000. HUBBELL received the $45,000, but did not write the articles. After HUBBELL pled guilty in December 1994, he continued to represent to CSEF that he would complete the articles. By December 1995, HUBBELL still had not written the articles. Phillips, the founder of CSEF, decided to reimburse CSEF the $45,000. HUBBELL then volunteered to repay Phillips, and made a $10,000 payment to Phillips in January 1996.

41 b. In or about February 1996, WEBSTER L. HUBBELL provided Phillips a promissory note in the amount of $45,000 and a security agreement. CHARLES C. OWEN drafted the note and agreement and SUZANNA

W. HUBBELL signed it as attorney-in-fact for WEBSTER L. HUBBELL. The security agreement provided that certain specified pieces of the HUBBELLs' art collection, valued at approximately $40,000, would secure the promissory note. The security agreement had the effect of encumbering the art collection and subordinating the interest that the IRS and other creditors, such as the State of Arkansas and the District of Columbia, had in the art collection, to the interest of Phillips. Even though the promissory note and agreement were dated December 14, 1995, they were not prepared, executed and filed until February 1996.

42. On or about March 26, 1996, WEBSTER L. and SUZANNA W. HUBBELL entered into a contract in the amount of $613,000.00 to sell their personal residence located at 3843 Macomb Street, Northwest, Washington, D.C.

43. On or about April 14, 1996, WEBSTER L. and SUZANNA W. HUBBELL filed their 1995 joint U.S. Individual Income Tax Return which was prepared by MICHAEL C. SCHAUFELE. The return was signed by SUZANNA W. HUBBELL on behalf of WEBSTER L. HUBBELL and herself. This return failed to report capital gains and interest income from the installment sale of a warehouse the HUBBELLs owned in Little Rock. WEBSTER L. and SUZANNA W. HUBBELL made no tax payment with the tax return, which reported a tax due and owing of $112,281.00. The unreported income from the warehouse sale would have caused the tax due and owing with the 1995 return to be substantially greater than $112,281.00.

44. After OWEN was unsuccessful in persuading the William Morris Agency to open an escrow account (as

described above in Paragraph 40), on or about May 28, 1996, MICHAEL C. SCHAUFELE opened a non-interest-bearing checking account at the Pulaski County Bank in Little Rock, Arkansas. This non-interest-bearing account did not generate a Form 1099, a copy of which would be sent to the IRS. The account was opened in the name, "MIKE C. SCHAUFELE for the benefit of WEBB and SUZY HUBBELL," (hereinafter referred to as the FBO [For the Benefit Of] account), Post Office Box 1126, Little Rock, Arkansas 72203. The opening deposit into the account was an $18,000 book advance check from William Morris Agency, Inc. and Harper Collins Publishers, payable to WEBSTER L. HUBBELL. The only signatory on the account was MICHAEL C. SCHAUFELE. This account was opened and used to impede and impair various entities, including the Internal Revenue Service from collecting monies owed by concealing funds available to the HUBBELLs. In some instances, funds that had been deposited into the HUBBELL Children's Education Trust were transferred into the FBO account and spent by or made available by SCHAUFELE for the benefit of WEBSTER L. and SUZANNA W. HUBBELL.

45. In or about May 1996, OWEN contacted an Internal Revenue Service Officer in the Washington, D.C., office of the Internal Revenue Service to discuss the HUBBELLs' outstanding federal tax liabilities. OWEN agreed to provide the officer with a copy of the 1995 Federal tax return and work with SUZANNA W. HUBBELL to complete a Collection Information Statement Form 433-A.

46. In or about May 1996, the Internal Revenue Service (IRS) sent OWEN a summary of the federal taxes owed by the HUBBELLs for the years 1989, 1990, 1991, 1992, 1994, and 1995. As of May 1996, the amounts owed were as follows:

47.

Tax Year	Tax and Penalty	Tax, Penalty and Interest as of 5/20/96
1989	$ 43,878.48	$ 78,555.03
1990	$ 65,984.50	$103,898.16
1991	$115,972.75	$166,143.72
1992	$ 85,346.86	$112,428.83
1994	$154,206.85	$184,433.53
1995	$112,281.00	$115,663.88
TOTAL	$577,670.44	$761,123.15

48. On or about August 7, 1996, the IRS recorded a lien against the HUBBELLs in Washington, D.C. for the years 1989, 1990, 1991, 1994, and 1995 in the amount of $607,629.73.

49. On or about August 12, 1996, SUZANNA W. HUBBELL signed and filed a IRS Collection Information Statement (Form 433-A) which purported to list financial information including income, assets and liabilities. SUZANNA W. HUBBELL was assisted in preparing this form by CHARLES OWEN. This form reported equity in assets of $12,758 and liabilities of $1,696,869.

50. The Form 433-A failed to disclose the existence of certain bank accounts including:

a. Account No. *2009927* at Pulaski County Bank titled "MIKE C. SCHAUFELE For the Benefit of WEBB and SUZY HUBBELL." SCHAUFELE was the signature authority on the account.

b. Account No. *1542842* at Metropolitan National Bank. That account was styled "HUBBELL Children's Education Trust, MIKE C. SCHAUFELE Trustee." SCHAUFELE and his secretary were the signature authorities on the account.

c. Account No. *1542834* at Metropolitan National Bank. That account was titled "HUBBELL Family Support Trust . . . MIKE C. SCHAUFELE Trustee."

SCHAUFELE and his secretary were the signature authorities on the account.

51. The Form 433-A also required SUZANNA W. HUBBELL to identify whether she or WEBSTER L. HUBBELL were a, "participant or beneficiary to trust, estate, profit sharing, etc. . . ." SUZANNA W. HUBBELL answered no to that question when, in fact, she and WEBSTER L. HUBBELL did participate in and benefit from certain accounts and trusts which she did not report on the Form 433-A.

52. In or about October through November 1996, the HUBBELLs caused a joint Amended U.S. Individual Income Tax Return, Form 1040X, for 1994, to be prepared and filed with the IRS. This return was prepared by Capital Accounting, a Washington, D.C. accounting firm.

53. The Schedule C attached to the amended return reported additional income from WEBSTER L. HUBBELL's "consulting" business of approximately $77,000 for a new total of $453,075. This additional income came from five clients which HUBBELL did not report on the original 1994 tax return. This unreported income was not reflected on Forms 1099 that were filed with the IRS. The new Schedule C continued to falsely and fraudulently claim approximately $10,000 in personal travel expenses for family members which the HUBBELLs claimed as business expenses.

54. This amended return was prepared and filed after WEBSTER L. HUBBELL was subpoenaed by the Office of Independent Counsel for certain records related to income from his "consulting" business, and after HUBBELL was questioned about his consulting clients by a United States Senate Committee.

55. In or about late October 1996, in settlement of a lawsuit that the Rose Law Firm brought against WEB-

STER L. HUBBELL, HUBBELL entered into an agreement to pay the Firm restitution for funds he had stolen from the Firm and/or certain clients. WEBSTER L. HUBBELL agreed to make certain payments to the Firm. He also agreed that if he earned any gross income in excess of $100,000 minus certain tax payments, per year, to pay 50% of such income to the Rose Law Firm until he satisfied his restitution obligation. SUZANNA W. HUBBELL's income was excluded in the calculation of WEBSTER L. HUBBELL's gross income.

56 a. In or about November through December 1996, following his release from incarceration, WEBSTER L. HUBBELL renewed his efforts to obtain a book contract.

56 b. In or about November 1996, the District of Columbia notified the HUBBELLs that they owed taxes to the District in the following amounts:

TAXES, PENALTIES AND INTEREST OWED

Tax Year	Tax	Tax, Interest, and Penalty
1994	$30,560.00	$44,617.60
1995	$20,836.00	$28,545.32
TOTAL	$51,396.00	$73,162.92

57. On or about March 13, 1997, CHARLES OWEN prepared and filed with the State of Arkansas, Articles of Organization for a company entitled Bridgeport Group, LLC. According to Bridgeport's Operating Agreement, WEBSTER L. HUBBELL had a 49% ownership interest, SUZANNA W. HUBBELL had a 49% ownership interest, and the Children's Trust had a 2% ownership interest. MICHAEL C. SCHAUFELE was listed as the "managing member."

58. On or about April 15, 1997, the HUBBELLs filed a U.S. Joint Individual Income Tax Return, Form 1040, for 1996. SCHAUFELE prepared the 1996 tax return.

The HUBBELLs omitted $18,000 in income the William Morris Agency paid WEBSTER L. HUBBELL. The payment was an advance for a book contract WEBSTER L. HUBBELL entered into with Harper Collins. SCHAUFELE deposited the $18,000 into the FBO bank account SCHAUFELE set up for the benefit of the HUBBELLs.

59. In or about June 1997, WEBSTER L. HUBBELL, through Bridgeport, entered into a book contract with the William Morrow and Company, Inc., a book publisher. Though HUBBELL appeared to have only a 49% ownership interest in Bridgeport, in fact, HUBBELL acknowledged to William Morrow that he owned and controlled Bridgeport.

60. Under the terms of the agreement, Morrow agreed to pay a $400,000 advance, which WEBSTER L. HUBBELL agreed to split evenly with his ghostwriter. The agreement provided for three installment payments: $150,000 upon the signing the agreement; $150,000 upon completion of the manuscript; and $100,000 upon the book's publication.

61. On or about June 17, 1997, Bridgeport received a check for $49,500. This amount represented WEBSTER L. HUBBELL's share of the first installment of the advance after expenses and payments to prior publishers were deducted.

62. On or about June 19, 1997, a bank account was opened at Pulaski Bank, Account No. 3058662, in the name of Bridgeport Group, LLC. MICHAEL C. SCHAUFELE and his secretary had signature authority on this account. Also on June 19, 1997, the check for $49,500 was deposited into the account. The defendant used Bridgeport and its bank account in an attempt to conceal certain financial transactions to impede and impair the

IRS and other creditors. Further, WEBSTER L. HUBBELL made no estimated tax payments with this money. The HUBBELLs were able to spend the book advance before the IRS could discover the location of the funds.

63. As of July 1997, the HUBBELLs owed taxes, interest and penalties to the District of Columbia in the following approximate amounts:

TAXES, PENALTIES AND INTEREST OWED

Tax Year	Tax	Tax, Interest, and Penalty
1994	$30,560.00	$47,826.40
1995	$20,836.00	$31,045.64
TOTAL	$51,396.00	$78,872.04

64. In or about February 1997, the State of Arkansas notified the HUBBELLs that they owed state taxes with interest for the tax year 1994. In or about October 1997, the State of Arkansas notified the HUBBELLs that they owed state taxes with interest for the tax years 1989 through 1993.

The relevant amounts of taxes and interest are as follows:

Tax Year	Tax	Tax with Interest
1989	$ 4,762.30	$ 7,789.67
1990	$ 8,322.00	$12,067.99
1991	$14,753.00	$19,912.48
1992	$10,510.00	$13,138.90
1994	$ 1,759.00	$ 2,032.73
TOTAL	$40,106.30	$54,941.77

65. As of the Fall 1997, the HUBBELLs owed Federal, State and District taxes, interest and penalties of approximately the following:

Federal [1989, 1990, 1991, 1992, 1994, 1995]	$761,123.15
State [1989, 1990, 1991, 1992, 1994]	$ 54,941.77
District [1994, 1995]	$ 78,872.04
Total:	$894,936.96

MONEY EARNED

66. From January 1994 through December 1997, the HUBBELLs received in excess of one million dollars in income. During this same time period, the HUBBELLs were credited with withholding and payments for the years 1989-1992, 1994, and 1995, totaling approximately $23,055.07 to the IRS, $2,516.71 to the State of Arkansas and $4,367.19 to the District of Columbia. Their outstanding tax liabilities for these same years, after credit for these payments, totaled in excess of $500,000. Their total liabilities, including taxes, interest and penalties for these same years totaled in excess of $894,000.

PURCHASES

67. During 1994 through 1997, the HUBBELLs used approximately 20 credit cards to purchase goods and services. These cards included among others American Express Gold, Platinum, and Optima cards, Nordstrom, Ann Taylor, Bloomingdales, Dillards, Lord & Taylor, and Saks.

68. During the years 1994-1997 the HUBBELLs made personal (non-business) purchases by check and credit card of approximately $750,000. During this same period they also made substantial payments on their personal debt.

69 a. Payments for these purchases during 1994-1997 included, but were not limited to, clothing and accessory purchases of approximately $85,000; private school tuition payments of approximately $95,000 (some payments for which were made from funds provided by WEBSTER L. HUBBELL's sister and James Riady to the education trust); telephone charges of approximately $20,000; laundry and dry-cleaning payments of approximately

$10,000; purchases from Ace Beverage of approximately $11,500 (in addition to grocery purchases); beauty salon payments of approximately $5,000; and domestic help payments of approximately $9,900.

69 b. During this same period, currency withdrawals were made from the HUBBELLs' accounts in excess of $60,000.

INCOME FROM IRA ACCOUNT WITHDRAWALS

70. From in or about February 1994 continuing through October 1995, WEBSTER L. HUBBELL made numerous withdrawals from his Individual Retirement Account (IRA) at Worthen Bank. These withdrawals totaled approximately $223,310.58.

71. A person who makes a premature withdrawal from an IRA is subject to an early withdrawal penalty. All withdrawals, whenever made, are subject to having 20% of the withdrawal amount withheld to offset federal taxes. The 20% is automatically withheld unless the account holder signs a written statement requesting that there be no withholding. The written request HUBBELL signed at Worthen Bank notified him that, "[Y]ou are liable for payment of the same taxable portion of your distribution. You may be subject to tax penalties under the estimated tax payment rules if your payments of estimated tax and withholding, if any, are not adequate."

72. In every instance of an IRA withdrawal, WEBSTER L. HUBBELL filled out and signed or caused MICHAEL C. SCHAUFELE to fill out and sign a document in which he expressly elected to withdraw all the funds without having taxes withheld to pay over to the IRS.

73. The withdrawals and elections included the following:

	DATE of Withdrawal Request	AMOUNT
1.	1/23/94	$19,000.00
2.	3/16/94	$20,000.00
3.	1/20/95	$30,000.00
4.	5/1/95	$50,000.00
5.	6/8/95	$65,000.00
6.	7/12/95	$ 2,414.32
7.	8/9/95 (date received)	$ 7,829.91
8.	10/12/95	$29,066.35
	TOTAL	$223,310.58

PENSION ACCOUNT CHECK SWAP

74. The last withdrawal from WEBSTER L. HUBBELL's IRA at Worthen Bank of $29,066.35 in October, 1995, actually involved a transaction with HUBBELL's pension plan at the Rose Law Firm.

75. As do many businesses, the Rose Law Firm (RLF) operated a pension plan for the benefit of its employees. WEBSTER L. HUBBELL contributed to the pension plan at RLF when he worked there.

76. Similar to the rules for an IRA, pension plan withdrawals were subject to a 20% withholding to offset federal income taxes. Unlike an IRA, however, withholding on premature pension plan withdrawals was *mandatory*. One could *not* elect to simply defer the taxes until the return was filed. An individual *could*, however, roll over pension funds *into* an IRA without any withholding.

77. During the time he worked at the RLF, WEBSTER L. HUBBELL borrowed against (from) his profit sharing/pension plan.

78. In or about August 1995, the RLF, notified WEBSTER L. HUBBELL that he was in default on three outstanding loans he had from the RLF's profit sharing plan. The outstanding balance owed, including interest, was approximately $29,066.35. If WEBSTER L. HUBBELL did not become current on the loans or did not pay off the loans, the RLF would declare the loan in default, which would result in a taxable distribution to WEBSTER L. HUBBELL. Because of the mandatory 20% withholding requirement, WEBSTER L. HUBBELL would not only have income of $29,066.35, he would also be required to pay the pension plan 20% of the amount which in turn would be paid to the IRS for withholding.

79. On or about August through October 1995, MICHAEL C. SCHAUFELE devised a plan, in which WEBSTER L. HUBBELL assisted, to cancel WEBSTER L. HUBBELL's debt owed to the RLF without paying any withholding to the IRS. SCHAUFELE was able to accomplish this transaction by "proposing that we swap checks." The check swap worked as follows.

80. On or about October 10, 1995, SCHAUFELE provided three checks to the RLF drawn on WEBSTER L. HUBBELL's checking account at Worthen Bank (now NationsBank) totaling $29,065.35 to pay off the past due debt. At the time SCHAUFELE provided the checks, there were insufficient funds in WEBSTER L. HUBBELL's Worthen account to cover the checks.

81. SCHAUFELE then persuaded an individual at the RLF that, in order for the RLF to receive payment, the RLF had to hold these checks and not immediately deposit them until SCHAUFELE could deposit funds to cover them, funds he would receive ultimately from the RLF profit sharing/pension plan account.

82. The RLF then, at SCHAUFELE's request, directed that a check be issued from the RLF's profit sharing plan clearing account for $29,066.35 to be paid to WEBSTER L. HUBBELL's IRA account at Worthen. Since the transfer was from the pension plan to HUBBELL's IRA, no withholding was required.

83. SCHAUFELE then immediately caused the IRA to transfer $29,066.35 to WEBSTER L. HUBBELL's personal account at Worthen. SCHAUFELE signed the election as WEBSTER L. HUBBELL's power of attorney to have no withholding from the IRA.

84. The $29,066.35 was used to cover the three checks drawn on WEBSTER L. HUBBELL's personal account that were given earlier in the day to the RLF. SCHAUFELE then notified the RLF to deposit the three checks into its clearing account to cover the check previously issued on that account. The purpose of SCHAUFELE and WEBSTER L. HUBBELL in structuring the transaction in this fashion was so that WEBSTER L. HUBBELL did not have to pay the IRS 20% withholding. The individual at the RLF was willing to accommodate this transaction in order to end the RLF's dealings with WEBSTER L. HUBBELL on this matter.

Conclusion

85. a. In January 1994, WEBSTER L. HUBBELL and SUZANNA W. HUBBELL had approximately $223,000 in an IRA and pension plan, a coin and art collection, and equity in a house and warehouse. Between 1994 and 1996 they earned over a million dollars. By the end of 1997, the HUBBELLs had liquidated all of those assets and spent virtually all their money.

85. b. As of December 31, 1997, the HUBBELLs owed the IRS (for the years 1989-1992, 1994 and 1995),

the State of Arkansas (for the years 1989-1992 and 1994) and the District of Columbia (for the years 1994 and 1995) over $895,000 and had not made any further payments to reduce those years' liabilities.

COUNT 1

(Conspiracy)

THE GRAND JURY FURTHER CHARGES THAT:

86. From in or about Spring 1994, the exact date being unknown to the grand jury, continuing to in or about January 1998, in the District of Columbia and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN

Defendants,

knowingly, willfully and unlawfully conspired, confederated and agreed with each other and with other persons to commit the following offenses:

(1) to willfully, knowingly, and unlawfully defraud the United States, and an agency thereof, by impeding, impairing, obstructing, and defeating the lawful functions of the United States Department of the Treasury, Internal Revenue Service, in the ascertainment, computation, and collection of the revenue;

(2) to willfully attempt to evade or defeat a tax due and owing to the United States, in violation of Title 26 United States Code, Section 7201;

(3) to knowingly and willfully devise, and intend to devise, a scheme and artifice to defraud: the State of Arkansas of taxes, interest, and penalties; the District of Columbia of taxes, interest, and penalties; and the Rose Law Firm of Little Rock, Arkansas, of money in connection with a Settlement Agreement entered into in October 1996 and the creation and use of Bridgeport Group, LLC; by means of false and fraudulent pretenses, representations and promises, and by means of the United States mail carriers, in violation of Title 18, United States Code, Section 1341; and

(4) to knowingly and willfully devise, and intend to devise, a scheme and artifice to defraud: the State of Arkansas of taxes, interest, and penalties; the District of Columbia of taxes, interest, and penalties; and the Rose Law Firm of Little Rock, Arkansas, of money in connection with a Settlement Agreement entered into in October 1996 and the creation and use of Bridgeport Group, LLC; by means of false and fraudulent pretenses, representations and promises, and by means of wire transmissions in interstate commerce, in violation of Title 18, United States Code, Section 1343.

WAYS, MANNER AND MEANS

87. It was a part of the conspiracy that certain actions were taken as follows:

(1) The defendants, through various means, attempted to obstruct, impede and impair the lawful functions of the Internal Revenue Service in its attempts to determine the HUBBELLs' true income and taxes for certain years and to collect those taxes due.

(2) The defendants attempted to evade the payment of hundreds of thousands of dollars in taxes, interest and penalties that the HUBBELLs owed to the United States.

(3) False and fraudulent U.S. Individual Income Tax Returns for WEBSTER L. HUBBELL and SUZANNA W. HUBBELL were prepared, signed and filed with the Internal Revenue Service.

(4) The defendants attempted to defraud the State of Arkansas and the District of Columbia out of income taxes owed by the HUBBELLs.

(5) The defendants attempted to defraud the Rose Law Firm out of money owed to the Firm as a result of WEBSTER L. HUBBELL's embezzlement, which the Firm attempted to recover through a Settlement Agreement entered into with WEBSTER L. HUBBELL in or about October 1996.

(6) Certain bank accounts were created and used to conceal funds from the Internal Revenue Service and other creditors and to impede the Internal Revenue Service's and other creditors' ability to locate funds and assets owned or controlled by the HUBBELLs.

(7) Certain financial transactions were structured and orchestrated so that the HUBBELLs' income taxes would not be withheld and paid over to the Internal Revenue Service. These transactions included withdrawals from a pension plan and an Individual Retirement Account (IRA) without any taxes being withheld.

(8) Bridgeport Group, LLC, was created and used to impede the Internal Revenue Service and other creditors. WEBSTER L. HUBBELL was listed as less than a 50% owner when, in fact, he controlled the company. Similarly, a bank account was created in Bridgeport's name

with persons other than WEBSTER L. HUBBELL as signatory to further impede the IRS and others.

(9) The HUBBELLs liquidated assets and spent funds, while at the same time failing to make tax payments to the Internal Revenue Service, the State of Arkansas, and the District of Columbia. The result was that the HUBBELLs spent substantial funds on personal items to the detriment of these Government entities.

(10) Certain financial records relating to the HUBBELLs were subpoenaed from SCHAUFELE by a federal grand jury, which were not produced to the grand jury at the time called for.

(11) Further, the defendants took various actions to conceal the objectives of the conspiracy.

88. The factual allegations in Introductory Paragraphs 1-85 are realleged and incorporated by reference into Count 1 as further describing the Ways, Manner, and Means of the conspiracy.

OVERT ACTS

89. In furtherance of the conspiracy and to effect the objects of the conspiracy, the following overt acts, among others, were committed in the District of Columbia and elsewhere:

90. The factual allegations in paragraphs 19-22, 24-25, 30, 32, 40, 41b, 43-44, 49, 51, 52, 57-59, 61, 62, 69, 73 (2-8), 80-84 are reallaged as separate overt acts in furtherance of the conspiracy.

(In violation of 18 U.S.C. § 371)

COUNT 2

(Impede and Impair IRS)

THE GRAND JURY FURTHER CHARGES THAT:

91. Beginning in or about Spring 1994, the exact date being unknown to the grand jury, and continuing through in or about January 1998, in the District of Columbia, and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN,

Defendants,

did corruptly endeavor, and aid and abet to endeavor, to obstruct and impede the due administration of the revenue laws as further described below.

92. The factual allegations in Introductory Paragraphs 1-85, and 87(1)-(11) are realleged and incorporated by reference into Count 2 as further describing the endeavor to obstruct and impede the due administration of the revenue laws.

(In violation of 26 U.S.C. § 7212(a))

COUNT 3

(Tax Evasion)

THE GRAND JURY FURTHER CHARGES THAT:

93. Beginning in or about Spring 1994, the exact date being unknown to the grand jury, and continuing through in or about January 1998, in the District of Columbia and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN,

Defendants,

did willfully attempt to evade and defeat the payment of a large part of the income tax due and owing by WEBSTER L. and SUZANNA W. HUBBELL for the calendar years 1989, 1990, 1991, 1992, 1994 and 1995, by engaging in conduct the likely effect of which was to mislead and conceal information from the IRS, as further described below.

94. Introductory paragraphs 1-85, and the factual allegations in Count 1, paragraph 87(1)-(11), are realleged and incorporated by reference into Count 3 as further describing the attempt to evade and defeat the payment of income taxes.

(In violation of 26 U.S.C. § 7201)

COUNT 4

(Aid in Preparing A False Return)

THE GRAND JURY FURTHER CHARGES THAT:

95. The factual allegations contained in Introductory paragraphs 1-16, 24, 30, 31, 32, 34, and 41 of this Indictment are realleged as though fully set forth herein.

96. On or about October 4, 1995, within the District of Columbia and elsewhere,

WEBSTER L. HUBBELL, Defendant,

did willfully aid and assist in, procure, counsel, and advise the preparation and presentation to the IRS, of a joint U.S. Individual Income Tax Return, Form 1040 for the calendar year 1994, for WEBSTER L. and SUZANNA W. HUBBELL. The return was signed and filed with the Internal Revenue Service. The defendant, WEBSTER L. HUBBELL, did not believe the tax return to be true and correct as to every material matter, in that the return reported on Schedule C, line 1, gross business receipts of $376,075, business travel expenses on Schedule C line 24a of $22,089, business income on Form 1040, line 12 of $321,861, and adjusted gross income on line 31 of $440,637, whereas in truth and in fact, and as the defendant then and there well knew and believed, one or more of the following lines on the tax return were false and fraudulent in that,

1. Schedule C line 1 substantially understated gross receipts,

2. Schedule C line 24a substantially overstated business expenses,

3. Form 1040 line 12 substantially understated business income, and

4. Form 1040 line 31, substantially understated adjusted gross income.

(In violation of 26 U.S.C. § 7206(2)).

COUNT 5

(Aid in Preparing a False Tax Return)

THE GRAND JURY FURTHER CHARGES THAT:

97. The factual allegations contained in Introductory paragraphs 35, 36, and 43 of this Indictment are realleged as though fully set forth herein.

98. On or about April 14, 1996, in the District of Columbia and elsewhere,

MICHAEL C. SCHAUFELE, Defendant,

did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service, of a U.S. Individual Income Tax Return, Form 1040, of WEBSTER L. and SUZANNA W. HUBBELL for the calendar year 1995, which return was signed and filed with the IRS, and which return was false and fraudulent as to a material matter, in that on line 8a the return reported interest income of $760, on line 13 the return reported no capital gains, and on line 31 the return reported adjusted gross income of $317,232, whereas in truth and in fact, and as the defendant then and there well knew and believed, one or more of the following lines on the tax return were false and fraudulent in that,

1. line 8a understated interest income,

2. line 13 understated capital gains, and

3. line 31 understated adjusted gross income,

by omitting from the return income received in 1995 from the installment sale of a warehouse to Hamilton Associates.

(In violation of 26 U.S.C. § 7206(2)).

COUNTS 6-10

(Mail Fraud and Wire Fraud)

THE GRAND JURY FURTHER CHARGES THAT:

99. The factual allegations contained in paragraphs 1-85 of this Indictment are realleged as though fully set forth herein.

100. From in or about October 1995, through in or about December 1997, within the District of Columbia and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN,

Defendants,

did knowingly and willfully devise and execute, and attempt to devise and execute, and aid and abet the devising and execution of, a scheme and artifice to defraud the District of Columbia of money and property, that is, approximately $73,162.92 of taxes, penalties, and interest due and owing for the years 1994 and 1995, by means of false and fraudulent pretenses, representations and promises.

MEANS AND METHODS OF THE SCHEME AND ARTIFICE TO DEFRAUD

101. The means and methods of the scheme and artifice to defraud include the same means and methods listed in Count 1, paragraphs 87(7)-(11), of this Indictment. As such, the factual allegations contained in paragraph 87(7)-(11) of Count 1 of this Indictment are realleged as if fully set forth herein.

THE MAILINGS/WIRE TRANSMISSIONS

102. On or about the dates listed below, within the District of Columbia and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN,

Defendants,

for the purpose of executing, and attempting to execute, and aiding and abetting the execution of the above described scheme and artifice to defraud, knowingly caused the items listed below to be sent and delivered by the United States Postal Service, according to the directions thereon; or caused the transmission by means of a wire (telephone facsimile) communication in interstate commerce the writing, sign, and signal described below:

Count	Date	Wired From	Wired To	Item
6 WIRE FRAUD 18 USC 1343	2/13/96	Michael C. Schaufele 620 West Third St., Suite 400 Little Rock, AR, Fax no. 501-375-6825	Law Firm Fax No. 202-383-6610, Washington, D.C.	Letter and attached Statement of D.C. Income Tax Due

Count	Date	Mailed From	Mailed To	Item
7 Mail Fraud 18 USC 1341	8/15/96	Government of the District of Columbia, 441 4th St., N.W., Washington, D.C.	HUBBELL Residence, 3843 Macomb St NW WASH	Notice of D.C. Tax Due-Income System, for the HUBBELLS for 1995
8 Mail Fraud 18 USC 1341	8/22/96	Government of the District of Columbia, 441 4th St., N.W. Suite 300,	HUBBELL Residence, 3843 Macomb St NW WASH	Notice of Intent to file Lien for 1994

Count	Date	Mailed From	Mailed To	Item
9 Mail Fraud 18 USC 1341	11/27/96	Government of the District of Columbia, 441 4th St., N.W. Suite 300, Washington, D.C.	620 W. 3rd, Little Rock, Arkansas	Notice of District Tax Lien
10 Mail Fraud 18 USC 1341	12/10/96	Government of the District of Columbia, 441 4th St., N.W. Suite 500, Washington, D.C.	HUBBELL Residence, 3843 Macomb St., N.W., Washington, D.C.	Notice of Intent to File Lien

All in violation of Title 18, United States Code, Sections 1343 (Count 6) and 1341 (Counts 7-10), and 2.
A True Bill:

/s/ Illegible
Grand Jury Foreman

/s/ Kenneth W. Starr
KENNETH W. STARR
Independent Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Judge James Robertson

Criminal No. 98-0151 (JR)

UNITED STATES OF AMERICA

v.

WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, and CHARLES C. OWEN,
Defendants.

EXHIBITS TO MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT WEBSTER HUBBELL TO DISMISS OR FOR A *KASTIGAR* HEARING

United States District Court

EASTERN DISTRICT OF ARKANSAS

TO: **Webster Hubbell**

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

☐ PERSON ☑ DOCUMENTS OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	ROOM
Federal Grand Jury U.S. Post Office & Courts Bldg., 4th Floor 600 West Capitol Little Rock, Arkansas	#470
	DATE AND TIME November 19, 1996 9:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

See Rider Attachment to Federal Grand Jury Subpoena.

Personal appearance not required if the requested documents are delivered on or before the return date to CI Lee Giannini at the Office of the Independent Counsel, 1701 Centerview Drive, Suite 203, Little Rock, Arkansas 72211, telephone number (501) 221-8700, for submission to the Grand Jury.

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
JAMES W. McCORMACK	October 31, 1996
(BY) DEPUTY CLERK Rebecca Carpenter	#2072

This subpoena is issued upon application of the United States of America

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Independent Counsel
Kenneth W. Starr
Steve Parker, Esq. SP
2 Financial Centre, Suite 134
10825 Financial Centre Parkway
Little Rock, Arkansas 72211 (501) 221-8700

*If not applicable, enter "none."

To be used in lieu of AO110

FORM OBD-279
JAN 96

SUBPOENA RIDER

A. Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to the identity of employers or clients of legal or any other type of work.

B. Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to billing memoranda, draft statements, bills, final statements, and/or bills for work performed or time billed from January 1, 1993 to the present.

C. Copies of all bank records of Webster Hubbell, his wife, or children for all accounts from January 1, 1993 to the present, including but not limited to all statements, registers and ledgers, cancelled checks, deposit items, and wire transfers.

D. Any and all documents reflecting, referring, or relating to time worked or billed by Webster Hubbell from January 1, 1993 to the present, including but not limited to original time sheets, books, notes, papers, and/or computer records.

E. Any and all documents reflecting, referring, or relating to expenses incurred by and/or disbursements of money by Webster Hubbell during the course of any work performed or to be performed by Mr. Hubbell from January 1, 1993 to the present.

F. Any and all documents reflecting, referring, or relating to Webster Hubbell's schedule of activities, in-

cluding but not limited to any and all calendars, day-timers, time books, appointment books, diaries, records of reverse telephone toll calls, credit card calls, telephone message slips, logs, other telephone records, minutes, databases, electronic mail messages, travel records, itineraries, tickets for transportation of any kind, payments, bills, expense backup documentation, schedules, and/or any other document or database that would disclose Webster Hubbell's activities from January 1, 1993 to the present.

G. Any and all documents reflecting, referring, or relating to any retainer agreements or contracts for employment of Webster Hubbell, his wife, or his children from January 1, 1993 to the present.

H. Any and all tax returns and tax return information, including but not limited to all W-2s, form 1099s, schedules, draft returns, work papers, and backup documents filed, created or held by or on behalf of Webster Hubbell, his wife, his children, and/or any business in which he, his wife, or his children holds or has held an interest, for the tax years 1993 to the present.

I. Any and all documents reflecting, referring, or relating to work performed or to be performed or on behalf of the City of Los Angeles, California, the Los Angeles Department of Airports or any other Los Angeles municipal governmental entity, Mary Leslie, and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail,

bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

J. Any and all documents reflecting, referring, or relating to work performed or to be performed by Webster Hubbell, his wife, or his children on the recommendation, counsel or other influence of Mary Leslie and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

K. Any and all documents related to work performed or to be performed for or on behalf of Lippo Ltd. (formerly Public Finance (H.K.) Ltd.), the Lippo Group, the Lippo Bank, Mochtar Riady, James Riady, Stephen Riady, John Luen Wai Lee, John Huang, Mark W. Grobmyer, C. Joseph Giroir, Jr., or any affiliate, subsidiary, or corporation owned or controlled by or related to the aforementioned entities or individuals, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

DEFINITIONS AND INSTRUCTIONS

1. *Definitions*

a. The term "document" or "documents" as used in this subpoena means all records of any nature whatsoever within your possession, custody, or control or the possession, custody, or control of any agent, employee representative, or other person acting or purporting to act for or on your behalf or in concert with you, including but not limited to memoranda, records, reports, notes, books, files, summaries or records of conversations, meetings, or interviews, summaries or records of telephone conversations, diaries, calendars, datebooks, telegrams, facsimiles, telexes, telefaxes, electronic mail, computerized records stored in the form of magnetic or electronic coding on computer media or on media capable of being read by computer or with the aid of computer related equipment, including but not limited to floppy disks or diskettes, disks, diskettes, disk packs, fixed hard drives, removable hard disk cartridges, mainframe computers, Bernoulli boxes, optical disks, WORM disks, magneto/optical disks, floptical disks, magnetic tape, tapes, laser disks, video cassettes, CD-ROMs, and any other media capable of storing magnetic coding, microfilm, microfiche and other storage devices, voicemail recordings, and all other written, printed, or recorded or photographic matter or sound reproductions, however produced or reproduced.

The term "document" or "documents" also includes any earlier, preliminary, preparatory, or tentative version of all or part of a document, whether or not such draft was superseded by a later draft and whether or not the terms of the draft are the same as or different from the terms of the final document.

b. The term "communication" or "communications" is used herein in its broadest sense to encompass any transmission or exchange of information, ideas, facts, data, proposals, or any other matter, whether between individuals or between or among the members of a group, whether face-to-face, by telephone, or by means of electronic or other medium.

c. "Possession, custody, or control" means in your physical possession and/or if you have the right to secure or compel the production of the document or a copy from another person or entity having physical possession, including, but not limited to, your counsel or agent.

d. The term "referring or relating" to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject including, but not limited to, documents concerning the preparation of other documents.

2. *Instructions*

a. The originals of all documents and communications must be produced, as well as copies within your possession, custody, or control.

b. If any original document cannot be produced in full, produce such document to the extent possible and indicate specifically the reason for your inability to produce the remainder.

c. Documents shall be produced as they are kept in the usual course of business, as organized in the files.

d. File folders, labels, and indices identifying documents called for shall be produced intact with such documents. Documents attached to each other should not be separated.

e. In reading this rider, the plural shall include the singular and the singular shall include the plural.

f. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The use of the word "including" shall be construed without limitation.

g. In the event that any document, or portion thereof, called for by this subpoena is withheld on the basis of any claim of privilege or similar claim, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; (c) addressee; (d) the position or title of the addressee; (e) any indicated or blind copies; (f) date; (g) a description of the subject matter of the document; (h) number of pages; (i) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, has been disclosed, distributed, shown, or explained; and (k) present custodian. Each basis you contend justifies the withholding of the document shall also be specified. With respect to those documents or records as to which you may claim privilege, or attorneys' work product, set forth as to each such document the basis for such claim, including the purpose and circumstances surrounding the creation of the document, the identity of each person who has been privy to such communication reflected in the document, the identity of any person or entity instructing the subpoena recipient or the attorney of the subpoena recipient to withhold production of the document, and whether you will submit the document to the Court for an *in camera* determination as to the validity of the claim. If the existence of a joint defense agreement or any agreement as to common interest is relevant to the assertion of any claim of privilege or similar claim, please provide a copy of that agreement; if any such agreement is not in writing, please set

forth the date of the creation of the agreement, the identities of all parties to the agreement and the specific individuals who entered into the agreement on behalf of those parties, and the objects, purposes, and scope of the agreement.

h. In the event that any document called for by this subpoena has been lost, destroyed, deleted, altered, or otherwise disposed of, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; (c) addressee; (d) the position or title of the addressee; (e) indicated or blind copies; (f) date; (g) a brief description of the subject matter of the document; (h) number of pages; (i) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, had been disclosed, distributed, shown or explained; (k) the date of the loss, destruction, deletion, alteration, or disposal and the circumstances thereof; and (l) the reasons, if any, for the loss, destruction, deletion, alteration, or disposal and the person or persons responsible.

i. If any information or data is withheld because such information or data is stored electronically, it is to be identified by the subject matter of the information or data and the place or places where such information is maintained.

[OIC logo]

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

November 8, 1996

By telefacsimile and First Class Mail

John W. Nields, Jr., Esq.
Howrey & Simon
1299 Pennsylvania Avenue, Northwest
Washington, D.C. 20004-2402

Re: *Webster L. Hubbell*

Dear John:

This will follow up on our conversation Wednesday evening, November 6, 1996, concerning Grand Jury Subpoena No. 2072, which seeks certain business, financial and tax records from your client, Webster L. Hubbell.

We have examined the question you posed concerning the precise scope of a grant of immunity directed to the act of producing the subpoenaed documents. You indicated that you interpret the holding in *United States v. Doe*, 465 U.S. 605 (1984), to operate so as to prevent *any* evidentiary use of the documents against Mr. Hubbell. However, *Doe* and its progeny are completely at variance with your view. The Court was very clear in *Doe* in limiting the scope of Fifth Amendment protection, and consequently of use immunity, applicable to the business records involved.

> Respondent argues that any grant of use immunity must cover the contents of the documents as well as the act of production. We find this contention unfounded. To satisfy the requirements of the Fifth Amendment, a grant of immunity need be only as broad as the privilege against self-incrimination. As discussed above, the privilege in this case extends only to the act of production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records.

465 U.S. at 617 n.17 (citations omitted). Accordingly, the Court held as follows:

> We conclude that the Court of Appeals erred in holding that the contents of the subpoenaed documents were privileged under the Fifth Amendment. The act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003.

Id. at 617. *See also United States v. J.W.O.*, 940 F. 2d 1165, 1166-1167 (8th Cir. 1991) (government need only offer immunity under section 6002 to the act of production in order to obtain individual's subpoenaed business records; challenge to use of evidence obtained through compelled act of production must await post-indictment suppression hearing). We see no meaningful distinction between the circumstances in *Doe* and the subpoena to Mr. Hubbell. Certainly the fact that Mr. Hubbell might contend that some of the subpoenaed records are personal rather than (or as well as) business is of no import. *See In re Grand Jury Subpoena Duces Tecum*, 1 F. 3d 87, 93 (2d Cir. 1993) (collecting cases) (Fifth Amendment does not protect contents of voluntarily prepared business or personal records), *cert. denied*, 114 S. Ct. 920 (1994).

Hence, a grant of immunity here consistent with the *Doe* decision will prohibit the government only from introducing the act of production of documents against Mr. Hubbell. It will not restrict the use of the contents of the documents.

As we have indicated, we are prepared to provide formal, court-ordered act of production immunity, co-extensive with the holding in *Doe*; alternatively, we are prepared to do so by letter. Please notify us by the close of business today how you would like to proceed.

We are looking into the second question you raised—whether we can reconcile the subpoena compliance date with Mr. Hubbell's pending transfer to a halfway house facility. We will get back with you on that issue shortly.

Sincerely,

KENNETH W. STARR
Independent Counsel

By: /s/ John D. Bates
JOHN D. BATES
Deputy Independent Counsel

HOWREY & SIMON

Attorneys at Law
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2402
(202) 783-0800

John W. Nields, Jr.
(202) 383-6639

November 12, 1996

BY FACSIMILE

John D. Bates, Esq.
Deputy Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 - North
Washington, D.C. 20004

Dear John:

I am writing to confirm what I said to you by phone on Friday, and to respond more formally to your letter of November 7, 1996.

The reason why the Fifth Amendment protects compelled production of documents *and other things* is that the subpoenaed party is implicitly forced to say whether the documents or things are in existence and under his control. The fact that there is writing on a document to be produced is not pertinent to the analysis. *See Fisher v. United States*, 425 U.S. 391, 410 (1976). I think we are on common ground so far.

I believe a document or other thing produced under a grant of immunity is the fruit of the compelled act of production. It is evidence "derived from" the testimony implicit in the act of production. On this point I think we disagree.

Courts have not yet resolved which one of us is correct. In the *J.W.O.* case, cited in your letter; in *In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir.) (Scalia, J.), *cert. denied sub nom., Wiggins v. United States*, 479 U.S. 924 (1986); in *Matter of Grand Jury Proceeding, Special April 1987*, 890 F.2d 1, 4 (7th Cir. 1989); and in *United States v. Porter*, 711 F.2d 1397, 1403 n.5 (7th Cir. 1983), the courts expressly declined to decide at the subpoena enforcement phase the question whether the document is "tainted" fruit of the compelled testimonial act of production. But I believe language in each of those cases is helpful to my view.

In addition, I believe the immunity *statute* poses a significant barrier to your view. The statute says that when evidence is compelled pursuant to a statutory immunity order "no testimony *or other information* compelled under the order (or *any information directly or indirectly derived* from such testimony or other information)" may be used against the witness. "Information" is a defined term under the immunity statute, and it includes "documents". This too is consistent with my view that the information is the fruit of the act of production.

Since we differ as to the ability of the government to use documents produced under immunity I believe Mr. Hubbell will have to proceed under the statutory immunity route rather than by letter agreement. This will leave each of us in a position to argue later—if necessary—our positions concerning the effect of the statutory immunity.

I should mention one other point. I assume you agree that the government cannot compel production under 18 U.S.C. §§ 6002-3 without giving the full protection provided by the statute. In other words, the government has no power to compel production while giving less protec-

tion than the statute provides—whatever that may be. The statute says the Court *must* issue the immunity order if applied for; the witness must provide the testimony or other information if given an order "under this title"; and the witness then *automatically* receives the protection provided by 18 U.S.C. § 6002. If you disagree with this, please let me know, so that we may try to find a way to resolve the matter before November 19, 1996.

Sincerely,

/s/ John W. Nields, Jr.
JOHN W. NIELDS, JR.

[Filed Nov. 14, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. GJ-96-3

IN RE: GRAND JURY PROCEEDINGS

ORDER COMPELLING PRODUCTION OF DOCUMENTS

On motion of the United States, and it appearing to the satisfaction of the Court:

1. That Webster L. Hubbell has been subpoenaed to produce certain documents to the Grand Jury;

2. That Webster L. Hubbell has refused to produce said documents to the Grand Jury on the basis of his fifth amendment privilege against self-incrimination;

3. That in the judgment of the Independent Counsel, the production of said documents by Webster L. Hubbell is necessary to the public interest; and

4. That the motion filed herein has been made by the Independent Counsel pursuant to the authority vested in him by 18 U.SC. § 6003 and 28 U.S.C. § 594(a)(7);

NOW, THEREFORE, IT IS ORDERED pursuant to 18 U.S.C. § 6002:

1. That Webster L. Hubbell shall produce any and all documents as described in the Rider appended to Grand Jury Subpoena Duces Tecum Number 2072; returnable on November 19, 1996;

2. That Webster L. Hubbell is granted immunity to the extent allowed by law. *See United States v. Doe*, 465 U.S. 605 (1984) and *United States v. J.W.O.*, 940 F.2d 1165 (8th Cir. 1991).

SO ORDERED this 14 day of November 1996.

/s/ Susan Webber Wright
United States District Judge

BEFORE THE GRAND JURY
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Case Name: MADISON GUARANTY, *et al.*
Witness Name: WEBSTER LEE HUBBELL

BE IT REMEMBERED, that on the 19th day of November, 1996, the above-referenced proceedings came before the Grand Jury for the United States District Court, Eastern District of Arkansas, 600 West Capitol, Little Rock, Arkansas, beginning at 10:31 a.m.

* * * *

[2] (The witness was duly sworn by the Grand Jury Foreman.)

EXAMINATION

BY MR. PARKER:

Q. Could you state your name, please, and spell your last name?

A. My name is Webster Lee Hubbell, H-u-b-b-e-l-l.

Q. Mr. Hubbell, you were served with a Subpoena requesting documents; is that correct?

A. Yes.

Q. And have you brought those documents here today with you.

A. Based on my Fifth Amendment privilege against self-incrimination and on advice of counsel, I decline to state whether there are documents within my possession, custody, or control responsive to the Subpoena.

MR. PARKER: And for the ladies and gentlemen of the Grand Jury, everybody has a right under the Fifth Amendment. You should not ever consider that in this case, that anybody invoke that right, and you should decide this case on the evidence and not take into consideration at all that this gentleman has taken exercised his right under the Fifth Amendment.

Q. [By Mr. Parker:] Now, Mr. Hubbell, I believe you have been advised that the United States approached Judge Susan Webber Wright with a motion and obtained an order [3] compelling production of the documents. At this time, I am going to have the Foreman read you that order. There's a copy in front of you also.

GRAND JURY FOREMAN: Okay. "Grand Jury Proceedings, Order Compelling Production of Documents. On Motion of the United States, and it appearing to be satisfactory of the Court:

"1. That Webster L. Hubbell has been subpoenaed to produce certain documents to the Grand Jury.

"2. That Webster L. Hubbell has refused to produce said documents to the Grand Jury on the basis of his Fifth Amendment privilege against self-incrimination.

"3. That in the judgment of the Independent Counsel, the production of said documents by Webster L. Hubbell is necessary to the public interest; and

"4. That the motion filed herein has been made by the Independent Counsel pursuant to the authority vested in him by 18 U.S.C. 6003 and 28 U.S.C. 594(a)(7);

"Now, therefore, it is ordered pursuant to 18 U.S.C. 6002:

"1. That Webster L. Hubbell shall produce any and all documents as described in the Rider appended to Grand Jury Subpoena Duces Tecum Number 2072; returnable on November 19, 1996;

"2. That Webster L. Hubbell is granted immunity to [4] the extent allowed by law. See United States v. Doe, 465 U.S. 605 (1984) and United States v. J.W.O., 940 F. 2d 1165 (8th Cir. 1991). So ordered this 14th day of November, 1996."

MR. PARKER: It's signed by Susan Webber Wright, United States Judge?

GRAND JURY FOREMAN: Signed by Susan Webster Wright, United States District Judge.

MR. PARKER: Thank you, Mr. Foreman. I'd like to mark this as an exhibit.

Q. [By Mr. Parker:] Okay. At this point, Mr. Hubbell, do you understand that order?

A. Yes, sir. I'd like to show it to my counsel.

Q. That's fine. We'll take about a 10—we'll take a 10 minute break while we're doing that, if that's okay with y'all.

(The witness was excused at 10:36 a.m. and was recalled at 10:45 a.m.)

GRAND JURY FOREMAN: Mr. Hubbell, you are reminded you are still under oath.

A. Okay.

Q. [By Mr. Parker:] You don't have even to—Mr. Hubbell, did you bring documents here with you today?

A. Yes.

Q. And where are they at?

[5] A. Right outside the door.

Q. Okay. We are going to take a break and go outside and look at those now. Okay. Thank you, Mr. Hubbell.

(The witness was excused at 10:45 a.m. and was recalled at 10:50 a.m.)

GRAND JURY FOREMAN: You are reminded, sir, you are still under oath.

A. All right, sir. Thank you.

Q. [By Mr. Parker:] Now, Mr. Hubbell, you received the Subpoena that was issued to you; is that correct?

A. Yes.

Q. And attached to it was a Subpoena Rider asking for particular documents; is that correct?

A.Yes.

Q. Now I only have one copy, so I am going to have to—we are going to have to go over this. I don't have one to hand you.

A. Okay.

(Grand Jury Exhibit No. 1244 marked for identification.)

Q. I am going to hand you what's a copy of Exhibit—well, I'll just hand you a copy of Exhibit 1244. Now, paragraph A of the Subpoena Rider, I am going to summarize this, but it says, "Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received, provided to you, [6] your wife, or children from January 1st, 1993 to the present, including identity of employers, clients, legal or other type work." Did you provide all those documents pursuant this Subpoena?

A. Yes.

Q. Paragraph B, "Any and all documents reflecting, referring, relating to any direct or indirect sources of money or other things of value received by or provided to Webster Hubbell or his wife or children from January 1st, 1993 to the present, including but not limited to billing memoranda, draft statements, bills, final statements, or bills for work performed or time billed from January 1, 1993 to the present."

A. Yes.

Q. Have you provided all those documents?

A. Yes.

Q. C is a copy of all bank records for you, your wife, your children, for all accounts from January 1, 1993 to the present, and lists registers, canceled checks, etc. Did you provide all those documents?

A. Yes

Q. All right. Including your children's bank records?

A. Those that are in my possession.

Q. Okay. Those are all the records in your possession, custody, or control; is that correct?

[7] A. Yes.

Q. That would include—well, we'll talk about that outside.

A. Okay.

Q. Paragraph D, "Any and all documents reflecting, referring, or relating to time worked or billed by you from January 1, 1993 to the present." Have you provided all those records?

A. Yes.

Q. Including those that are in your—are there any that you had that are not in your possession, custody, or control? Did you give—has anybody else gotten any of your billing records, memoranda, anything like that?

A. Yes.

Q. Are they—are those records not here today or are copies in these boxes?

A. I think we need to step out.

Q. I do, too.

(The witness was excused at 10:54 a.m. and was recalled at 11:05 a.m.)

GRAND JURY FOREMAN: You are reminded again, sir, that you are still under oath.

A. Okay.

Q. [By Mr. Parker:] Mr. Hubbell, when I started—let's go back. Let's back up one second.

[8] A. Okay.

Q. And I said the Subpoena calls for you to produce any records that was in your possession or under your control. And you're a lawyer. You understand the concept of constructive possession, that if you give somebody else something—if I loan somebody my car but I have the right to ask for my car back, that's still within my possession.

A. Yes, sir.

Q. You understand this Subpoena would require you to produce those documents?

A. I understand.

Q. And your answers to paragraphs A, B, and C, your answers were yes, that you've produced all those records?

A. Right.

Q. With that in mind, is your answer still yes to those paragraphs?

A. Yes, it is.

Q. On paragraph D, reflecting, referring, and relating to time worked or billed by you from January 1st, 1993 to the present?

A. Yes.

Q. Have you produced all those records?

A. Yes. I have.

Q. Paragraph E, "Any and all documents reflecting, referring, or relating to expenses incurred or [9] disbursements of money by you during the course of any work performed or to be performed from January 1, '93 to the present. Have you provided all those documents?

A. That are in my custody and control, yes.

Q. Any and all documents—paragraph F, "Any and all documents reflecting, referring, or relating to sched-

ules of activities, this means calendars, telephone books, airline tickets—" there's a whole laundry list, "—from January 1st, 1993 to the present." Have you provided all the records requested in paragraph F?

A. Can I—I need to look at this just one second.

Q. Sure. Take your time.

A. The answer is yes, subject to the attorney/client privilege.

Q. All right. Paragraph G, "Any and all documents reflecting, referring, or relating to any retainer agreements or contracts for employment of you, your wife, or children from January 1, 1993 to the present." Have you provided all those documents here today?

A. Yes.

Q. Paragraph H asks for all your tax records for you, your wife, and your children for tax years 1993 to the present. Have you provided all those?

A. Yes.

Q. That are in your possession. Are your children's [10] tax records in here?

A. [No audible answer.]

Q. Okay. Paragraph I, "Any and all documents reflecting, referring, or relating to work performed or to be performed for or on behalf of the City of Los Angeles, the Los Angeles Department of Airports, or any other Los Angeles municipal or governmental agencies—or governmental entity, Mary Leslie or Alan S. Arkatov," and it gives a laundry list.

A. The answer is yes.

Q. All right. Paragraph J, "Any and all documents reflecting, referring, or relating to work performed or work to be performed by Webster Hubbell or his wife or children on the recommendation, counsel, or other influence of Mary Leslie or Alan Arkatov," and asks for a similar list to the paragraph above. Have you provided all of those documents?

A. Yes. Subject to the attorney/client privilege.

Q. Paragraph K, "Any and all documents related to work performed or to be performed for or on behalf Lippo Ltd., formerly Public Finance, H. K. Ltd., the Lippo Group, the Lippo Bank, Mochtar Riady, James Riady, Stephen Riady, John Leun Wai Lee, John Huang, Mark W. Grobmyer, C. Joseph Giroir, Jr., or any affiliate, subsidiary, or corporation owned or controlled by or related to the aforementioned [11] entities or individuals, including but not limited to," and it gives a list of documents.

A. The answer is yes.

Q. Okay. All right. Now, I've read over this and I've summarized portions. Did you read this document in its entirety before you came here today, the rider, what we're asking? Do you fully understand everything we're asking for here today?

A. Yes. I do.

Q. And have you made a complete search for all the records that was asked for in this Subpoena?

A. We got to step outside, see if I can answer that.

MR. BENNETT: Well, have you made a search or caused a complete search to be made? You still need to step outside?

A. I need to step outside.

MR. PARKER: Very well.

(The witness was excused at 11:09 a.m. and was recalled at 11:25 a.m.)

GRAND JURY FOREMAN: Sir, you are reminded you are still under oath.

Q. [By Mr. Parker:] Okay. Mr. Hubbell, the question was, in response to the Subpoena, have you searched or have you made a thorough search or caused a thorough search to be made in response to this Subpoena?

[12] A. Yes.

Q. Now, other than the two assertions of attorney/client privilege on paragraphs J and K—or I'm sorry, J and F, have you withheld any other documents required by this Subpoena because of any other privilege?

A. There is attorney work product privilege.

Q. Is that the two paragraphs that you referred to earlier?

A. Yes.

Q. Okay. Other than those two paragraphs, are there any other documents withheld?

A. No.

Q. Under any other privilege?

A. No.

MR. BENNETT: And just so we're clear on the record, I take it there is some quantity of documents that you have not produced based on the assertion of those privileges; is that correct?

A. That's my understanding. Yes.

MR. PARKER: All right. That's all we have, Mr. Hubbell.

A. Thank you.

(The witness was excused at 11:28 a.m.)

[Filed Jan. 6, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

Division No. 94-1

IN RE: MADISON GUARANTY SAVINGS &
LOAN ASSOCIATION

Before: SENTELLE, *Presiding Judge*, BUTZNER and FAY, *Senior Circuit Judges.*

ORDER

Upon consideration of the Application for Order of Referral to Independent Counsel, filed with the Court on December 31, 1997, it is hereby

ORDERED that the Application be granted. Pursuant to 28 U.S.C. § 594(e), the following matters are referred to the Office of Independent Counsel for investigation and, if warranted, prosecution:

(i) whether Webster L. Hubbell or any individual or entity violated any criminal law, including but not limited to criminal tax violations and mail and wire fraud, regarding Mr. Hubbell's income since January 1, 1994, and his tax and other debts to the

United States, the State of Arkansas, the District of Columbia, the Rose Law Firm, and others; and

(ii) whether Webster L. Hubbell or any individual or entity violated any criminal law, including but not limited to obstruction of justice, perjury, false statements, and mail and wire fraud, related to payments that Mr. Hubbell has received from various individuals and entities since January 1, 1994.

The Independent Counsel shall have jurisdiction and authority to investigate and to prosecute the matters described above to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994. The Independent Counsel shall have jurisdiction to investigate allegations or evidence of violation of any federal criminal law, including related allegations or evidence, other than a Class B or C misdemeanor or infraction by any person or entity, as necessary to resolve the matter described above, and to prosecute such violations if warranted.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. The Independent Counsel shall continue to enjoy the full jurisdiction conferred upon him as a result of previous orders of this Court.

The Independent Counsel may disclose this document and its contents only to the extent necessary to advance the investigation and prosecution.

Per Curiam
For the Court:
MARK J. LANGER
Clerk

by /s/ Marilyn R. Sargent
MARILYN R. SARGENT
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 98-151-01-04

UNITED STATES OF AMERICA,
Plaintiff,

v.

WEBSTER L. HUBBELL, SUZANNA W. HUBBELL,
MICHAEL C. SCHAUFELE, and CHARLES OWEN,
Defendants.

Washington, D.C.
Friday, June 26, 1998

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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* * * *

[3] PROCEEDINGS

(10:00 a.m.)

(All defendants present except Defendant Owen).

THE DEPUTY CLERK: Your Honor, this is Crimnal Action 98-151, United States of America versus Webster L. Hubbell, Suzanna W. Hubbell, Michael C. Schaufele, and Charles Owen. Representing the government, David Barger.

MR. BARGER: Good morning, Your Honor.

THE COURT: David Binhak.

MR. BINHAK: Good morning, Your Honor.

THE DEPUTY CLERK: Patrick O'Brien, and Darrell Joseph.

THE COURT: Good morning.

THE DEPUTY CLERK: Representing the defendants, John Nields.

THE COURT: Mr. Nields.

THE DEPUTY CLERK: Laura Shores.

MS. SHORES: Good morning, Your Honor.

THE DEPUTY CLERK: Christopher Todd, Wan Kim, and Drake Mann.

MR. MANN: Good morning, Your Honor.

THE COURT: Good morning everybody.

A number of motions are before me—this big crowd here, I think maybe it is the overflow crowd that couldn't get in up the hall.

[4] Maybe we could just resolve these motions today and take them right over there. One-stop shopping.

There are a number of quite serious motions presented in this case and although I don't want to indicate any relative degree of importance with any of them, I think the motion to dismiss count 2, which is the motion taking the position that count 2 may not be charged because the Justice Department manual says it may not, is a motion on which I don't think I need to hear a lot of argument. The papers are clear. I think I can decide that without argument.

Similarly, the motion to dismiss counts 6 through 10, the mail and wire fraud counts, if we have some time, I may hear some argument on that; but I am not greatly in need of argument on that.

I would like to spend the time we have this morning —and by the way, there is no fixed time here. I am good until half past 12:00, if we need to be; and maybe even into the afternoon if we are—if the time for argument is necessary.

But I want to spend most of the time this morning talking about the motion to dismiss the indictment as to Mr. Hubbell who asserts—who asserts use of immunity for the documents he turned over under subpoena, and the motion to dismiss the indictment as outside the jurisdiction of Judge Starr.

[5] The motion to compel disclosures of the application for referral. Again I think I don't have to hear a lot of argument on; and the motion to—the OIC's motion to disqualify or for a hearing on the potential conflict of interest of Mr. Nields' law firm with respect to the two Hubbells is an issue we will reach, if at all, at a later time.

I think I would like to begin with the use immunity motion. Who's going to argue that? Mr. Nields?

MR. NIELDS: Your Honor, I am, for Mr. Hubbell. Good morning.

THE COURT: Good morning, sir.

MR. NIELDS: May it please the Court:

At the outset, at the very outset of this investigation that led to these charges, the independent counsel served on my client a document subpoena calling for the production of whatever documents he might have in a very

broad range. They included virtually any document relating to his finances, his wife's and children's finances, and his tax matters.

It turned out that among those documents were documents showing fees that had been inadvertently left off of his 1994 tax return; and for that and other reasons, Mr. Hubbell asserted his valid Fifth Amendment privilege and declined to tell the independent counsel what documents he had [6] if any that were responsive to the subpoena.

The independent counsel accepted that claim of privilege, went to the Court and got court-ordered sovereign immunity under the statute, section 6002 and then conferred immunity; and under protection of immunity, Mr. Hubbell honestly and truthfully admitted the existence of every single document that was responsive to that subpoena and then turned those documents over.

Thereafter, the independent counsel used those documents—and now I'm going to quote from their brief filed in this case, they used those documents, "To develop evidence that led to this prosecution."

They claim no independent source for the evidence that led to this prosecution. What they do is they assert that having compelled Mr. Hubbell to produce documents under immunity, documents which he had a Fifth Amendment right to withhold and they got only because of the immunity order, they claimed the right to use those documents against him to put him in jail.

We believe they're wrong and that they can't do that.

Your Honor, we submit that the relevant body of law —the most relevant body of law—is the law of immunity, and it is an emphatic and clear body of law. It begins with the statute. If I may, Your Honor—is this on?

[7] If I may, Your Honor, the immunity statute is comprehensive in its language. I can do it from here. I can see it from here. You can see it from here. We're fine.

It provides, Your Honor, that if a person's Fifth Amendment privilege is overridden with an immunity order, the witness can no longer refuse to answer based on his privilege. But this is what he gets in return: He gets a promise that no testimony or other information compelled under the order or any information directly or indirectly derived from such testimony or other information, may be used against that witness in a criminal case.

And in the landmark case, Your Honor, of Kastigar, which is the Bible on immunity—and it is alive and well as is demonstrated by the D.C. Circuit Court of Appeals decision against U.S. against North—Kastigar makes it very clear how comprehensive the immunity is that you get from this statute.

Kastigar talks about, and I'm quoting, "total prohibition on use." It says you get sweeping proscription of any use direct or indirect of the compelled testimony and any information derived therefrom.

It says that the witness is assured that the compelled testimony can in no way lead to the infliction of criminal penalties.

It is very clear, Your Honor, that you get protection not only from the testimony that you are compelled to give—[8] here the act of production or the testimony implicit in the act of production—you get immunity from anything that is derived from that testimony.

And then to make it absolutely clear, so that no one could misunderstand the nature of the immunity, Kastigar said the following: It said that the immunity statute was

constitutional because and only because it leaves the witness and the federal government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity.

The independent counsel says that they can take the documents that they got only under immunity, that he had a Fifth Amendment right to withhold, they can take the documents that they only got because of the immunity order and use those documents to put my client in jail.

That violates the clear and explicit test that is up on that board. Because it is undisputed that under the Fifth Amendment, Mr. Hubbell had a right to withhold those documents. The independent counsel could not have gotten those documents over his Fifth Amendment claim. They got the documents because of immunity.

And that test says they cannot use what they get under immunity that they couldn't get under the Fifth Amendment. They could not use that to put him in jail.

Your Honor, we quoted this language twice in our [9] brief, two different places. We featured it. It was not mentioned in the independent counsel's response. Kastigar is not discussed anywhere in the independent counsel's response. They cite it. They contain no discussion of it whatsoever. I do not know what their answer is to that. I don't believe they have any.

Another thing they didn't respond to, Your Honor, is the Supreme Court's fairly recent decision in Braswell.

The independent counsel makes the statement in their brief, which I put up on that board, they make the statement as the Supreme Court has recognized on several occasions act-of-production immunity will only rarely preclude the United States from using the contents of compelled records to find and develop evidence.

They say that, but they don't cite any Supreme Court cases, because there aren't any. There is no Supreme Court case that says that. What the Supreme Court says instead, I put that at the bottom—Braswell, majority opinion, written by the Chief Justice:

"If the government has any thought of prosecuting the custodian"—that's the person who produces the documents —"a grant of act-of-production immunity can have serious consequences. Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively."

[10] And then they go on to say in the very next sentence, "The government would have the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate, independent sources."

The independent counsel says nothing in its brief about that language in Braswell, which we also quoted on two occasions in our papers.

Your Honor, another thing the independent counsel doesn't say anything about is the purpose underlying the Fifth Amendment privilege. Indeed, one would get the impression I would submit from reading their brief—their papers and understanding their position that the Fifth Amendment privilege doesn't seem to have any purpose because it can be so easily done away with.

We submit, Your Honor, that the Fifth Amendment privilege relieves a person in this country of the obligation to tell the truth to the government when the truth may cost that person his life or his liberty.

The government cannot compel a person to tell the truth when the truth may cost that person his life or liberty.

Where the government serves process on a person in this country and as a practical matter that person has two options—as a practical matter—one is to tell the truth and risk going to jail or the electric chair and the other is to falsify and go free, when those are the options, faced by a [11] person who gets process from the government, the Fifth Amendment applies.

It does not permit falsification; but it relieves the person of the obligation to tell the truth. That's the cruel trilemma [sic]. That's all the cases that we cite. That, Your Honor, is the core of the Fifth Amendment privilege. It is the rock bottom, irreducible minimum, what the Fifth Amendment does. It is the Fifth Amendment without frills, Your Honor. It is the Fifth Amendment without anything that was added on to it by the so-called "liberal court" in the 1960s and '70s.

That is the basic Fifth Amendment privilege as it has existed since the time the Fifth Amendment was adopted as part of our Bill of Rights.

Now what the independent counsel says is that they can compel a person to tell the truth and have it cost them their life or liberty anyway. For example, they say that the prosecutor in Los Angeles could have given a subpoena to O.J. Simpson directing him to produce his Bruno Magli shoes. They admit that O.J. Simpson would have a Fifth Amendment right not to tell the government whether he had any Bruno Magli shoes and, therefore, not to comply with the subpoena. They concede the Fifth Amendment applies; but they say they could give an immunity, force him to tell the truth about whether he had those shoes and turn them over, and then they could use the shoes to put him in the electric chair.

[12] That's their position.

And they say that they can force Webb Hubbell to tell the truth about what documents he has, every single one. He has to tell them the truth about every single document when he might love to pretend he didn't have them. They can make him tell the truth, turn those documents over, and have that fact cost him his liberty.

THE COURT: Is the Bruno Magli shoes example quite precise enough? I mean, aren't they really telling—isn't this a subpoena to turn over the contents of your closet?

MR. NIELDS: Well, Your Honor, what we would say that the result is the same and the issue is not changed even if they give him a subpoena: Turn over all your shoes; and upon honest compliance with that, among the shoes he turns over are shoes that will put him in the electric chair.

The Fifth Amendment privilege is very clear, and the cases are very clear. The actual response to the question does not have to be itself incriminating for the Fifth Amendment privilege to apply. If the response to the question, truthful response will lead to incrimination, it applies; if it provide a link in a chain of evidence or would lead to evidence, it applies.

The issue is are you forcing the person to give a truthful response and using the fact that the person is truthful and honest in his response to put him in jail? If so [13] the Fifth Amendment applies and you can't do it.

And anybody who has ever had to respond to a document subpoena understands that truthfulness and honesty is absolutely critical and required.

In the normal civil litigation context, where the client is a corporation, the Fifth Amendment doesn't apply. It is a civil case, somebody has got to go over every single

document; and if they find one that is damaging to their case, they have to take that document, hold it up against the subpoena, and they have to honestly say is that called for; if it is, they have to turn it over.

But in the individual case, where it is a criminal investigation and being truthful and honest in response will result in your going to jail, the Fifth Amendment says you don't have to answer. That's why the Fifth Amendment applies to document subpoenas, which it does. That's conceded. That's the law of the land. It does apply. That's why.

That's common ground. And remember, again, the independent counsel has never taken the position that Hubbell had no Fifth Amendment privilege. They've conceded he had the privilege. He asserted it. He was entitled under his privilege to withhold the documents and not tell them what he had. They compelled it under immunity; and if they compel it under immunity, then they have to hold him harmless. That's the rule. That's the deal.

[14] Your Honor, there's one point really only one other point I want to mention. If the independent counsel's position here were true, were correct, and if it became the law of the land, then every prosecutor in the United States of America could begin his investigation by going to the target, serving a comprehensive document subpoena, forcing the target to produce all of that information, under immunity, and then poring through it to see if they could find some crime.

Wigmore, in a passage that we quote in our original brief, says that one of the purposes—and I would concede this is not the core purpose, which I have already discussed—but one of the purposes of the Fifth Amendment is to prevent precisely that kind of thing from happening.

Because there is something very wrong about a prosecutor beginning with the person and seeing if he can find a crime rather than beginning with the crime and seeing if he can find out who did it.

Your Honor, in my second year—

THE COURT: I'm back at Bruno Magli shoes.

MR. NIELDS: All right.

THE COURT: The Bruno Magli shoes hypothetical is also different from this case in that in that case, the prosecutor knew what the crime was he was investigating and knew what he was looking for; unlike this case where, as I understand it, the theory of the subpoena in the first place was is there evidence of obstruction of justice. And the [15] answer was maybe not obstruction of justice, but here's a tax problem, quite different from the Bruno Magli shoes. I'm not quite sure that's a question so much as thinking out loud, Mr. Nields. Proceed.

MR. NIELDS: My reaction to it, Your Honor, is twofold. First of all, once again, the Fifth Amendment clearly applies regardless of whether the risk of incrimination is in the mind of the questioner when they ask the question. Mr. Hubbell clearly had a right under the Fifth Amendment not to turn over documents that he thought they might use to try to prove some other crime against him. Clearly has that right.

I would submit, developing a point I was just making before, that there are extra special reasons to hold what the independent counsel was doing here inappropriate where, without probable cause to believe that there was any particular crime, they begin with the subject and force the subject to produce a wide range of documents which they then use to see if any one of a number of potential crimes may have been committed.

As I said, I was taught in second year law school that one of the most important principles of prosecutorial power was that you don't begin with the person; you begin with the crime and work back to the person. And if—if what was done here became the law of the land, every prosecutor in the country would have an easy path if they have a person they're interested in investigating to go to that person, compel them [16] to produce a wide range of documents under immunity, and then see if they could find some sort of crime.

And, indeed, I was taught that both the Fourth Amendment's requirement of probable cause before you can search an individual and the Fifth Amendment's prohibition against going to the individual as the primary source of information were in some way designed as tools that would steer prosecutors in the direction of investigating crimes and leading to people rather than the other way around.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Nields. Mr. Binhak?

MR. BINHAK: Yes, Your Honor. Good morning. I am Stephen Binhak. I represent the United States.

THE COURT: Good morning.

MR. BINHAK: Judge, I'd like to start with Braswell. That's an excellent place to start. And I want to start where Chief Justice Rehnquist started in Braswell, the first paragraph of his decision after he discussed what the facts of the case are and what did he say?

Chief Justice Rehnquist: "There is no question but that the contents of subpoenaed business records are not privileged."

No question.

And what's before Braswell? What leads up to Braswell? Doe; before Doe, Fisher. If Boyd were still the [17] law, then Mr. Hubbell might have an argument; but Boyd was decided in 1889, I believe. Since that time, the Supreme Court has announced that the contents of business record are not privileged.

Now, Mr. Nields, on behalf of his client, tells you that 6002 says otherwise, that the statute reaches into the contents. That is wrong. That is an argument that was made in front of the Seventh Circuit and was rejected. Let me read to you from the United States versus Porter, footnote 4.

"Such a reading, however, ignores the plain intent of the statute that the grant of immunity thereunder is intended to be as broad but not broader than the privilege against self-incrimination. Since Fisher held that the contents of these documents do not come under that privilege, the statute plainly does not extend to them. In addition, we note that Congress indicated that the statute's scope is intended to be comprehensive, including all information as given testimony or orally."

What is the Court saying there? They are saying what Kastigar says, and we emphatically agree. Kastigar says one thing: You got to put the guy who raises the Fifth Amendment defense, which is defeated by a compulsion order, in substantially the same position, but only substantially the same position; and the Seventh Circuit has said that the act-of-production immunity is a limited—limited—[18] immunity; and the reason they say limited is because you must—must—you must respect the distinction that Fisher and Doe and this District Court of the—excuse me, of the Court of Appeals for the District of Columbia—

THE COURT: Had a nice sound to it.

MR. BINHAK: Excuse me. This District Court, too—not you but other members of this District Court—have recognized over and over again that the contents is not privileged. That the acts of—the testimonial acts of production are.

THE COURT: Okay. We are all on the same page about contents.

MR. BINHAK: So the point is, Judge, how do we erase or negate the testimonial acts of production? How do we do that?

How do we put him in substantially the same position?

THE COURT: Okay.

MR. BINHAK: The answer is that we don't show and we don't tell any fact finder in this case about the fact that Mr. Hubbell produced documents pursuant to this subpoena.

THE COURT: Well, that's—do you construe the same position language to mean only the same position at trial?

MR. BINHAK: Sir, I believe that that—that will—will fully—will fully vindicate his Fifth Amendment rights [19] for the reasons I've outlined in my brief.

But don't take my word for it, Judge. That's what Judge Bryson wrote in his grand jury practice manual; and it—and he says that's what you do. That's what the Court in Northern District of Illinois did in Trader Roe. That's exactly what they did. That's exactly the remedy that they—that they fashioned and that's what works. And the reason is for—is because that action

negates the testimonial acts of production, and that's what we've immunized. We have not immunized the contents of the document.

THE COURT: Well, I don't have the advantage of knowing what the facts are of the cases that you're talking about the Northern District of Illinois case. But were any of those cases in which the prosecutor first asked for all of your documents, then decided whether you'd committed a crime, and then prosecuted you?

MR. BINHAK: Sir, in just about every case that we're referring to here—many of them are tax cases—and just about every case we're referring to was a subpoena for business records. That's how Doe two started with the sole proprietor for several of his businesses in Philadelphia where were—the government believed were implicated in organized crime kickbacks.

That's what the story was in Fisher when the IRS went to the lawyer for the accountant and asked for all the—[20] excuse me, the lawyer for the taxpayer and went for all his documents. That's what happened in Fox in the Second Circuit when the—and that's what happened in Trader Roe.

THE COURT: Mr. Binhak, let me ask you this: Let's get directly to the same position issue and let's forget the well, let's not forget it.

Let's construe the term "same position" meaning the same position throughout the process from beginning to end, not just before a jury.

MR. BINHAK: All right. I agree with you.

THE COURT: You do agree—

THE COURT: —that the language—

MR. BINHAK: Yes, sir.

THE COURT: —ought to be construed that broadly?

MR. BINHAK: Yes, sir. And I agree that our—

THE COURT: How does the government get these 13,000 pages of documents if it doesn't get them under compelled subpoena?

MR. BINHAK: Well, we could do it any number of ways, Judge.

THE COURT: How about a search warrant?

MR. BINHAK: A search warrant is fundamentally different than a subpoena.

THE COURT: Could you have gotten these documents [21] with a search warrant?

MR. BINHAK: At that time?

THE COURT: Yes.

MR. BINHAK: No.

THE COURT: Because?

MR. BINHAK: Because at that time—

THE COURT: —you didn't have probable cause, you couldn't convince a magistrate that you had probable cause to believe that the crime of nonpayment of taxes was involved?

MR. BINHAK: That is correct.

THE COURT: Okay.

MR. BINHAK: But that's a Fourth Amendment analysis sir, and a Fifth Amendment analysis is very different.

THE COURT: Well, I'm just trying to figure out how we're going to get him in the same position. You couldn't have got there with at search warrant?

MR. BINHAK: Yes, sir.

THE COURT: All right. How else would you get there?

MR. BINHAK: We would get there—we could do it one of two ways. First we could do it with a subpoena, which is what we did, and what we're allowed to do.

THE COURT: Well, that kind of begs the question.

MR. BINHAK: But we are allowed to do that. Then the cases are very clear that when he raises his Fifth Amendment [22] right, that we are allowed to compel his testimony.

Let me go back one step and say what the third way is.

The third way is we certainly could have gotten a Dun & Bradstreet on him. We could have found out what his bank records were. We could have gone and subpoenaed all the individual banks for these records. We could have gone to the papers that he filed with the IRS. We could have gone to the accountant. We could have gone to his credit card companies. We could have gone to his banks. We could have gotten every single one of those things.

THE COURT: And why didn't you do that?

MR. BINHAK: We do not have to do it in that order, Judge.

THE COURT: Because it is easier to do it the other way?

MR. BINHAK: It may be easier, but it puts him in no different position because—

THE COURT: Well, Mr. Binhak, isn't it actually correct that the reason you didn't do that is because you weren't looking for that information when you sought these documents, and you weren't looking for a tax violation at the time you sought these documents? You were looking for something quite different?

MR. BINHAK: Well—

[23] THE COURT: In fact, you were looking for evidence of obstruction of justice by other people, were you not?

MR. BINHAK: I don't—I agree with the first part of that but not wholly. I think it is accurate to say we were looking for obstruction of justice, Judge.

But on the other hand when we looked at mail fraud the first time with Mr. Hubbell, we found that there was tax evasion. And the obstruction of justice in this case was a very specific obstruction of justice, which was alleged at that time and was investigated by the Congress. And that was that Mr. Hubbell, it was alleged, was receiving payments as hush money in order to not cooperate with the Whitewater investigation.

Now, oftentimes when people receive illegal income, they do not report it on their taxes. That's why—and I know you know this, because I know you sit in a busy court. Tax counsel often are part of mail fraud and wire fraud prosecutions by the government. They are often a part of drug prosecutions by the United States. And they are often a part of just about virtually any criminal act which includes the accumulation of wealth. And why is that?

It's because people don't want to report their income to the United States so that the United States may be tipped off that they are engaging in illegal activity. So I

agree with you, Judge, that we were looking at obstruction of [24] justice; but to say that, thereby, we were necessarily not looking at anything else, I think is inaccurate.

Now, in addition, Judge, the only way we would have found out about tax violation is by reading the contents of the documents. That's how we found that.

And Bouknight, which is Justice O'Connor's case, where Justice O'Connor writes, says specifically—and this is the case where the child is compelled to be produced and the—the person who receives the subpoena says well if you get the child you'll be able to do any kind of test on them to be able to prove he's my child, you'll be able to prove that he's been abused, any one of these things. And Justice O'Connor says flatly out just because you subpoena the thing, there may be a Fifth Amendment issue there, with the act of production; but the contents will not be reached.

So the question then again comes back to this answer: How do we negate the testimonial acts of production? And there are three under Fisher. Number one, authentication. These documents are authentic. Number two, these documents exist. And number three, I'm the person who produced them.

When you look at the subpoena that Webster Hubbell received, you see he handed over documents; and we get them, as I described in my brief, on the street, in a box, with nothing but the subpoena to describe them. And what do we have? We have Webster Hubbell's business records.

[25] Now, if we read the documents and we find anything more, we're allowed to do that. This is from the beginning. I'm talking about the investigation now. We

can do that. Bouknight says we can do that. Fisher says we can do this. Both Doe's say we can do that. And all the cases in the D.C. Circuit say the same thing. They recognize that distinction. How do we put Webster Hubbell back into the same position? Because of the testimonial acts of production.

Well, we don't tell any fact finder at any time that he's the source of the records. If we do that, then we wipe out his authentication. No one will ever know that he was the source of these documents. And all the cases that deal with authentication say—including Fisher—say that if the government can put the document into evidence with someone else, they will never know that Webster Hubbell brought it, gave it to the government. If the government can prove the document—the—authenticate the document in any other way, then that negates the taint.

The same is true for the source and the existence, that if you don't tell anybody and you just treat it like a record, here's this record that I found on the ground, it is just a record, he's in the same position.

Now, if we read the record and find something out, if we find out that he's not reported income as we did here, if we find out that he's opened up bank accounts that were [26] specifically created with the intent to impair and impede the ability of the United States from getting the taxes that he admitted that he owed, if we do that through the contents of the document, there is no Fifth Amendment implication.

It does not touch that which we—what we immunize. Remember, under the Seventh Circuit limited act-of-production immunity is a limited immunity. And the Seventh Circuit says it does not create a free pass. It does

not create a total bar. What it does is it—look at the Fifth Amendment as an entire puzzle.

Act-of-production immunity takes out specific pieces and only for the act of production. We put those pieces back by not saying to a jury or to a judge in any evidentiary hearing that these records come from him. Now he's in the same position, Judge; and anything else that we get comes from the contents.

Now that satisfies Kastigar because he's in substantially the same position. He said I'm going to raise my Fifth Amendment right as to this little piece, these three testimonial aspects of production that are outlined in Fisher; and we give him that. That puzzle, that piece of the puzzle, we take out; and we protect that one hundred percent. That entire piece of the puzzle is protected.

But that doesn't change the rest of the puzzle. He has no Fifth Amendment right there. What they want you to do, [27] what they want you to do is say all right, well, you took out this piece of the puzzle but you have to give us protection on the whole puzzle. Well, that's wrong.

And Fisher and Doe and the D.C. Circuit and the Seventh Circuit say otherwise.

THE COURT: Which circuit and the Seventh?

MR. BINHAK: The Seventh Circuit. Specifically the —that's the Trader Roe and the Porter case—specifically say otherwise. The Seventh Circuit emphatically rejects, explictly rejects the argument that Mr. Nields came in and gave you first.

As far as a link in the chain, Judge, whether it will be a link in the chain, all that Webster Hubbell is left with, once we give him—once we negate the testimonial

acts of production, the only thing that he's left with is that he has produced business records from a particular period. That's it. We don't know that they're Webster Hubbell's business records. We don't know that—we don't know that he produced them. We have to treat them as business records, that we just tripped over on the street.

Now there's only—first of all, there's nothing incriminating about that. There's nothing incriminating about the fact that a person has business records.

If you want to import the Fisher analysis forward—which is the wrong thing to do, because that would be [28] appropriate if we said you have no Fifth Amendment right. We will not even give you Kastigar—the Doe immunity, and we went into a court down in Arkansas, where the subpoena was—where this was—where this subpoena was issued— if we went down there, they would have said we have a Fifth Amendment right. If we had said at that time you have no Fifth Amendment right, then all these cases that the defendant cites would become relevant; and what would—what would we be arguing? We would be arguing whether it was a foregone conclusion.

Well, what the United States submits to you is that when you negate the testimonial acts of production, the only thing you are left with is the fact that Webster Hubbell has business records. If you want to import—if you want to import the rest of that analysis left, there is nothing incriminating at all about saying I have business records. Period.

That's the only knowledge we get out of the production. Anything else we get, we get from reading the documents. So what do we have? Let's say we have a tax return? A tax return that shows that Webster Hubbell has not reported income for a year. Let's say 1996.

We don't know that it came from him. We have to find another way to prove that. We would have to go to the IRS. We would have to go to his accountant. We would have to go to his lawyer. And all of these people could raise privileges, they [29] could raise statutory objections. But if we can't get another way to put that in, we've got nothing except for one thing: The fact that Webster Hubbell has business records.

THE COURT: Okay. Mr. Binhak, let me make very sure I understand what you're saying here.

You're basically conceeding Mr. Nields' point. You probably wouldn't concede it with quite the rhetorical flourishes he gave it, but you are basically conceding Mr. Nields' point that you are asserting a government—a power on the part of the independent counsel to issue a subpoena to any citizen saying give me all of your records. And I'm going to go through them and read them; and if I find something in them that is going to give rise to a criminal prosecution, I'm going to prosecute you.

Now, I'm not going to tell anybody where I got these documents, and the jury will never know where I got them, and the jury won't know that they're yours; but now that I know what's in them, I know the information that I can use to prosecute you.

Are you basically conceding that argument of Mr. Nields'?

MR. BINHAK: Yes. And let me explain.

THE COURT: That's really scary.

MR. BINHAK: It is not scary, sir. Let me explain to you why it's not. Because the Supreme Court has said in Fisher [30] that's okay. And that's how—

THE COURT: Well, let me—what do you make of the language in Fisher that the existence prong is implicated, if compliance with a subpoena adds to the sum of the government's—to the jury's—the government's—total information? What do you make of that?

MR. BINHAK: I say that if you are going to fully vindicate Fisher's ruling, that the contents are not privileged, then what you have to come—the conclusion you have to come to is that that is negated by the fact that the protection that we're giving—and that is what—that is what the Seventh Circuit said when it spoke to this issue. That is what the Northern District of Illinois court said in Trader Roe. That's what the D.C. Circuit cases stand for.

THE COURT: What D.C. Circuit cases stand for that?

MR. BINHAK: Judge, I believe that's what then Justice Scalia meant when he talked about the distinction, when he raised the Kastigar issue with the specific subpoena that was issued in In Re Sealed Case. I'm right with Mr. Nields and you. If we had offered that kind of subpoena, if we had asked, if we had asked Webster Hubbell for all documents that are indicative of tax fraud, then when you wiped out the testimonial—

THE COURT: That's not my point. My point is give me all of your tax records. Give me all of your business [31] records.

MR. BINHAK: Judge—

THE COURT: Then we will find out if you committed tax fraud.

MR. BINHAK: That's exactly what happened in Fisher, Judge. In fact, in that case the District Court

ruled that there was absolutely no Fifth Amendment privilege. That's exactly what happened—and the United States Supreme Court said that's okay.

In fact, Judge, just recently in the District of Maryland here in Greenbelt there was a civil rights case that ended in a plea—so there is no reported decision—where the United States gave Doe immunity for a police officer, and the facts are this: The police officer is involved in a civil rights violation; and as part of that violation, he shot off his gun, and the gun pierced the door of the front door of a car of an individual.

The United States goes to the police department and they find out the serial numbers of the guns that the police officer was carrying that night.

Then they gave the police officer a production—a subpoena that said we want all the guns you were carrying on that night. The night of the event. The police officer hands over the gun, and the United States does forensic analysis of the gun, and it links the bullet back to the car. [32] That's the kind of Doe immunity that's used in courtrooms all across the United States, and it is allowed because Bouknight says it's allowed. Bouknight says that if—you can use the contents of articles; Doe and Fisher say you can use the contents; and the fact is, Judge, the United States can open grand jury investigations to find crimes. And this was not just pulling Webster Hubbell out of the air, although that is not an issue that you need to reach here; and the IRS starts tax investigations that way.

The IRS starts tax investigations, and the United States starts white collar crime investigations because they have a suspicion about someone; and the grand jury is entitled to decide whether those—whether those suspicions are true or not.

And the grand jury can issue subpoenas to make those determinations; and the grand jury has a dual purpose. The grand jury is to find out whether someone—whether there is a criminal violation, but also whether there is not a criminal violation; and so this is the province of the grand jury, to issue these kinds of subpoenas.

THE COURT: All right, Mr. Binhak, I have a couple more questions for you.

I think the first is what is your answer to Mr. Nields' question: Where has the Supreme Court recognized on several occasions that act-of-production immunity will only [33] rarely preclude the United States from using the contents of compelled records to find and develop evidence?

MR. BINHAK: The answer is that the Supreme Court has not said that language precisely, but that is the conclusion.

THE COURT: Well, then where have they recognized it?

MR. BINHAK: They have recognized the distinction between the contents, which are never privileged, and the production, act of production, which is not; and what follows from that, it comes from the Braswell case on page 118. The government may offer testimony, for example, from the process server who delivered the subpoena and from the individual who received the records establishing that the corporation produced the records subpoenaed.

The Court is saying that the government can put those records in from Braswell as long as they don't use—as long as they don't tell the jury that they got them from Braswell. Therefore, the government, as the government concedes—as it must—it may make no evidentiary use

of the individual act, the act of productions; and the Court puts those in quotations.

"For example, in the criminal prosecution against the custodian," and I'm reading from page 118 here, "the government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's [34] documents were delivered by one particular individual, the custodian."

That's where we're at, Judge. We're giving him what the Court tells us to give him in Braswell. We are completely wiping out the effects of forcing him to give us that portion—

THE COURT: I think we're getting repetitive here.

I take it then, Mr. Binhak, that you are not asserting and will not assert that the office of independent counsel at the time this subpoena was issued had any knowledge of the Bridgeport Group; right?

MR. BINHAK: I don't believe that was in the subpoena.

THE COURT: Or the account at the Pulaski County Bank?

MR. BINHAK: That was not in the subpoena.

THE COURT: Or the pension account check swap issue?

MR. BINHAK: But we did know Webster Hubbell had bank accounts.

THE COURT: And—you knew he had bank accounts and kept business records?

MR. BINHAK: Yes, sir. And if you read Trader Roe —and if you haven't, I know you will—you will see

Trader Roe specifically addresses this argument. It says that you don't have to know about the existence of every single [35] document and that comes from Fisher, because Fisher talks about classes and classifications of documents; and the Fisher—

THE COURT: So as far as you are concerned, the genus business records is big enough to permit the species check swaps and et cetera?

MR. BINHAK: Yes, sir. Fisher tells you that at page 419 and Butcher v. Bailey in the Sixth Circuit tells you the same. Because it tells you to look at classes of documents; and the only way you find out whether there was a check swap, the only way you find out whether there was a Pulaski Bank account, the only way you find out about any of this is by reading the contents of the documents.

And the Supreme Court has said it over and over and over again. No one compelled him to put those contents there.

THE COURT: Thank you, Mr. Binhak.

Brief reply, Mr. Nields?

MR. NIELDS: First, Mr. Binhak says that the D.C. Circuit Court of Appeals held in his favor in In Re Sealed Case; in other words, accepted the notion that the government can serve a document subpoena, compel production of documents under immunity, and then use the contents of the documents against the witness because the contents aren't privileged.

Actually what Judge—now Justice—Scalia said in that case is exactly the opposite; and I put that up on the board, Your Honor. The government made the same argument there [36] that they are making here, and he said

the fact that the contents of the tapes are unprivileged does not mean that they will necessarily remain untainted.

That's what the D.C. Circuit actually said.

Now I would like to respond just very briefly to the notion that all that one gets under immunity is a promise that the actual testimony given will not be used against you. In this case, the actual act of production will not be used against Mr. Hubbell. The jury won't be told about it.

There was a time, Your Honor, when Congress passed an immunity statute that only gave that protection. You only got protection from having your actual testimony used against you. Here, the act of production. Congress passed that statute. The Supreme Court struck it down because it was unconstitutional. That's Councilmen against Hitchcock and it is discussed at length in Kastigar.

What the government is saying here is that they want to give only the kind of immunity that the Supreme Court held unconstitutional in Councilmen against Hitchcock.

Third, they claim that the Bouknight or Bouknight case pulls in their favor. It doesn't at all. It doesn't involve immunity at all. It is a holding that the Fifth Amendment privilege simply did not apply to an order to produce a child. That's all it holds.

They quoted a moment ago from Braswell; but what they [37] didn't tell the Court is they were quoting from a part of Braswell that dealt with corporate documents. Fifth Amendment privilege does not apply even to the act of producing corporate documents. It was a very misleading quote that they gave.

Finally, Your Honor, I don't know exactly what was in their mind when they served the subpoena. I must say at the time I entertained the notion, I think the Court did,

that what they were really planning to do was get the evidence that they might use to see if someone else committed a crime; and then when that didn't work out, they then later turned around and decided to use them against Mr. Hubbell which violates immunity, it violates the Constitution, and this indictment should be dismissed.

Thank you.

THE COURT: Thank you, Mr. Nields.

All right. Before we take up the jurisdictional—jurisdiction of the independent counsel, a housekeeping matter.

I think I have two motions for leave to file under seal but one of them has been withdrawn. Am I correct about that?

MR. JOSEPH: Your Honor, one of the motions was withdrawn in part, that's correct.

THE COURT: In part?

MR. JOSEPH: In part. Yes.

* * * *

[Filed Jun. 30, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. Nos. 98-0394 (JR)
98-0151 (JR)

UNITED STATES OF AMERICA

v.

WEBSTER L. HUBBELL,
Defendant.

PLEA AGREEMENT

The United States, by and through the Office of the Independent Counsel, and Defendant Webster L. Hubbell, by and through the undersigned counsel, pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, have entered into this plea agreement ("Agreement"). If the Court refuses to accept this Agreement and the Defendant's guilty pleas as set forth below, this Agreement and his guilty pleas shall become null and void and neither party will be bound thereby. The terms and conditions of this Agreement are as follows:

1. Defendant Webster L. Hubbell agrees to plead guilty to Count 1 in *United States v. Webster L. Hubbell,* Cr. No. 98-0394, D.D.C.; and agrees to plead guilty to a one count Superseding Criminal Information in *United States v. Webster L. Hubbell,* Cr. No. 98-0151, D.D.C., filed with this Agreement, subject to the conditons set forth in paragraph 5 below.

2. Count 1 in Cr. No. 98-0394, a felony, charges Defendant Hubbell with concealing by scheme material facts from the Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC), in violation of 18 U.S.C. § 1001. Defendant agrees to withdraw his previous plea of not guilty and to enter a plea of guilty with respect to Count 1 only of Indictment Cr. No. 98-0394. The parties understand that the Defendant will admit that during the pendency of the *Frost* case, he knowingly failed to disclose to the FDIC and RTC by scheme a material fact which Defendant had a duty to disclose, namely, that during the pendency of the *Frost* case, the Rose Law Firm represented Precision Industries, a company whose president, and part owner, Jimmie D. Alford, was a defendant in the *Frost* case, as alleged in Paragraph 69(1) of Indictment Cr. No. 98-0394. The parties further understand that, had this case proceeded to trial, the Government was prepared to introduce evidence on Count 1 beyond that described in Paragraph 69(1) of the Indictment. The maximum penalty for this offense is a term of five years of imprisonment, a fine of $250,000, or an alternative fine based on gain or loss, any restitution ordered by the Court, a mandatory special assessment, and a three year period of supervised release.

3. The Superseding Criminal Information charges Defendant Hubbell with a misdemeanor for willful failure to pay a tax, in violation of 26 U.S.C. § 7203. Subject to the conditions in paragraph 5 below, Defendant agrees to enter a plea of guilty on Count 1 of the Superseding Criminal Information on the ground that he willfully failed to pay a portion of the tax due and owing. The maximum penalty for this offense is one year of imprisonment, a fine of $100,000, or an alternative fine based on gain or loss, any restitution ordered by the Court, a mandatory

special assessment, the costs of prosecution, and a one year period of supervised release.

4. The Court may, pursuant to § 5E1.2 of the *Sentencing Guidelines and Policy Statements,* order the Defendant to pay a fine sufficient to reimburse the government for the costs of probation, if any is ordered.

5. In exchange for Defendant Hubbell's pleas of guilty to Count 1 of Indictment Cr. No. 98-0394 and Count 1 of the Superseding Criminal Information Cr. No. 98-0151, the United States agrees that it:

(a) will dismiss with prejudice the remaining counts of Indictment Cr. No. 98-0394 at the time of sentencing;

(b) will dismiss with prejudice, at the time of Defendant Hubbell's sentencing, the Inudictment in Cr. No. 98-0151, D.D.C., as to Defendants Suzanna W. Hubbell, Michael C. Schaufele and Charles Owen;

(c) will not further criminally prosecute or investigate the Defendant, nor refer the Defendant to the Department of Justice for prosecution or investigation of any offenses arising out of the Independent Counsel's investigations; and

(d) intends to petition the Supreme Court for a writ of certiorari in *United States v. Webster L. Hubbell,* et al., No. 99-3044, concerning the Court of Appeals' decision with regard to act of production immunity. If certiorari is not sought or is denied, the United States agrees to move to vacate Defendant Hubbell's judgment of conviction on the Superseding Criminal Information and agrees to dismiss with prejudice the Indictment and Superseding Criminal Information in Cr. No. 98-0151 against Defendant Hubbell. If certiorari is granted and the Supreme Court resolves the case in a manner such that it fails

materially to improve the United States' position to the point that it is reasonably likely that Defendant Hubbell's act to production immunity does not pose a significant bar to his prosecution, the United States will move to vacate Defendant Hubbell's judgment of conviction on the Superseding Criminal Information and will move to dismiss with prejudice the Indictment and the Superseding Criminal Information in Cr. No. 98-0151 against Defendant Hubbell.

If certiorari is granted and the Supreme Court resolves the case in a manner that materially improves the United States' position to the point that it is reasonably likely that Defendant Hubbell's act of production immunity does not pose a significant bar to his prosecution, then the United States will not move to vacate Defendant Hubbell's judgment of conviction under the Superseding Criminal Information. The United States will, however, then move to dismiss with prejudice the Indictment in Cr. No. 98-0151 against Defendant Hubbell.

6. Pursuant to Fed. R. Crim. P. 11(e)(1)(C), the United States and the Defendant agree that the Defendant's sentence will not include incarceration.

7. The parties further recommend that the Court make the finding required by Sentencing Guidelines § 6B1.2(a) that the Court is satisfied either that the agreed sentence is within the applicable Guideline range or departs from the applicable range for justifiable reasons. Pursuant to Sentencing Guidelines § 6B1.2(c) and Fed. R. Crim. P. 11(e)(1)(C), this Agreement includes specific sentences calculated as follows:

I. Count 1, Indictment Cr. No. 98-394:

A. Offense Level

1. Base offense level 6, pursuant to Guidelines § 2F1.1(a);

2. No upward adjustment for loss, pursuant to Guidelines § 2F1.1(b)(1);

3. To the extent that a 2 level upward adjustment for more than minimal planning is warranted pursuant to Guidelines § 2F1.1(b)(2)(A), it is offset by the downward departure based on factors not adequately taken into account by the Sentencing Guidelines as set forth in subparagraph 7 below;

4. No adjustment because the offense did not substantially jeopardize the safety and soundness of a financial institution, pursuant to Guidelines § 2F1.1(b)(7)(A);

5. No adjustment for obstruction of justice or abuse of position of trust because such factors did not significantly facilitate the commission or concealment of the instant offense, pursuant to Guidelines §§ 3C1.1 and 3B1.3, respectively;

6. A 2 level downward adjustment for acceptance of responsibiliay upon execution of this Agreement and entry of the guilty plea pursuant to Guidelines § 3E1.1(a); and

7. An additional 2 level downward departure, pursuant to Guidelines § 5K2.0, based on factors not adequately taken into account by the Sentencing Guidelines, namely, Defendant's agreement to plead guilty more than a month

before trial; the resolution of two complex cases in lieu of trial, thereby permitting the government and the Court to allocate their resources to other matters; and the strong governmental and public interest in concluding matters as expeditiously as possible.

The parties agree that no further downward or upward departure from that set forth above is warranted. The adjusted offense level is therefore no higher than 4.

B. Criminal History Category and Sentencing Range

Based upon the calculations set forth above and the Defendant's Criminal History Category, the sentencing range is 0-6 months. Pursuant to Fed. R. Crim. P. 11(e)(1)(C), the specific sentence agreed to by the parties is a term of 1 year of probation, with no special conditions of confinement, to commence upon sentencing, no restitution, no fine, and a special assessment of $100. The parties agree that no restitution is appropriate because there was no loss to the Government as a result of the offense. The parties also agree that no fine is appropriate on this Count for the reasons set forth in paragraph 8 below.

II. Count 1, Superseding Criminal Information, Cr. No. 98-0151.

A. Offense Level

1. The parties agree that within the period covered by the Superseding Criminal Information, the Defendant had a duly assessed tax liability due and owing to the Internal Revenue Service in excess of $500,000;

2. The parties also agree that after the time of Defendant's sentencing (June 1995) in *United*

States v. Webster L. Hubbell, No. LR-CR-94-241 (E.D. Ark.) ("*Hubbell I*") his debts, including his tax liabilities from *Hubbell I*, substantially exceeded his assets, and that subsequent to Defendant Hubbell's sentencing in *Hubbell I*, the Defendant was unable to pay the full amount due and owing. Accordingly, the amount the Defendant willfully failed to pay is a figure lower than the assessed amount due;

3. The parties agree that the amount the Defendant willfully failed to pay is difficult to ascertain with certainty and is to some degree subjective. In addition, it is unclear to what extent the Court in *Hubbell I* included some portion of that underlying tax liability for sentencing purposes. The parties agree, however, that the combination of an adjustment for acceptance of responsibility and a downward departure on the ground described in subparagraph 4 below yields an offense level of no higher than 4;

4. The parties agree that a downward departure pursuant to Guidelines § 5K2.0 is warranted in this case based on factors not adequately taken into account by the Sentencing Guidelines, namely, the unusual circumstances of these two cases, including the following:

   (a) The Court of Appeals' decision in No. 99-3044 concerning act of production immunity creates considerable uncertainty whether, based on the legal standards announced by the Court of Appeals, the United States would prevail in further

proceedings in the District Court on Defendant's Motion to Dismiss;

   (b) The resolution of two complex cases in lieu of trial, thereby permitting the government and the Court to allocate their resources to other matters; and the strong governmental and public interest in concluding matters as expeditiously as possible and

5. The parties also agree that no adjustment for grouping is appropriate with respect to this plea and that no further downward or upward departure from that set forth above is warranted. The adjusted offense level is therefore no higher than 4.

B. Criminal History Category and Sentencing Range

Based upon the calculations set forth above and the Defendant's Criminal History Category, the sentencing range is 0-6 months. The specific sentence, agreed to by the parties, pursuant to Fed. R. Crim. P. 11(e)(1)(C), is a term of 1 year of probation with no special conditions of confinement, to commence upon sentencing, no restitution, no fine, and a special assessment of $25. The patries agree that no fine or restitution is appropriate on this Count for the reasons set forth in paragraph 8 below.

8. The parties agree that no fine is appropriate in view of the fact that the Internal Revenue Service asserts taxes, penalties and interest owing from the Defendant in excess of $761,123.15, and that the Defendant has substantial other debts and no substantial assets or substantial source of income. The Defendant agrees to use his best efforts to work with the Internal Revenue Service in a cooperative fashion to make reasonable payments toward his tax liability given the financial resources available to him.

Prior to sentencing, Defendant Hubbell agrees to pay $125 in special assessments.

9. Pursuant to Guidelines § 6A1.1, the parties jointly recommend that the Court direct that no Presentence Investigation and Report be made and that the Court proceed to sentencing immediately upon the entry of the guilty pleas. Defendant and the United States recommend that the Court make a finding pursuant to Fed. R. Crim. P. 32(b)(1)(A)&(B) that in light of the Presentence Report from *Hubbell I*, the length of the investigation in these matters, the previous proceedings before this Court between Defendant and the United States, the factual record developed in the preliminary proceedings and motions in these matters, and in the interests of all parties and judicial economy and finality, the Court has information sufficient to exercise its sentencing authority meaningfully without a Presentence Investigation and Report. However, should the sentencing judge defer the decision whether to accept or reject this Agreement, pursuant to Fed. R. Crim. P. 11(e)(2), until after there has been an opportunity to consider a Presentence Investigation and Report, nothing in this Agreement limits the rights of the parties to answer any inquiries from the United States Probation Office or the Court.

Nothing herein shall limit or in any way waive or release any civil claim, demand or cause of action, whatsoever, of the United States or its agencies relating to the conduct of the Defendant in this case. This Agreement is limited to matters within the jurisdiction of the Independent Counsel, and cannot bind other federal, state, or local prosecuting, administrative, or regulatory authorities except as to the matters set forth in this Agreement.

Nothing in this Agreement shall limit the Internal Revenue Service, as provided by law, in its assessment and

collection of said taxes, interest, or penalties from the Defendant.

10. The parties acknowledge and agree, pursuant to Fed. R. Crim. P. 11(e)(4), that if the Court rejects this Agreement, the Court shall, on the record, inform the parties of this fact, advise the Defendant personally in open court, or, on a showing of good cause, *in camera*, that the Court is not bound by the Agreement, afford the Defendant the opportunity then to withdraw the pleas, and advise the Defendant that if the Defendant persists in his guilty pleas the disposition of the case may be less favorable to the Defendant than that contemplated by this Agreement. Nothing in this Agreement waives the Defendant's rights under Fed. R. Crim. P. 11(e)(6) or Fed. R. Evid. 410.

11. With respect to the Defendant's post-incarceration period of supervision arising from *United States v. Webster Lee Hubbell*, No. LR-CR-94-241 (E.D. Ark.), the United States agrees that the offenses charged in Count 1 of Indictment Cr. No. 98-0394 and Superseding Criminal Information Cr. No. 98-0151 occurred prior to that supervision. In the event a violation proceeding is commenced by the United States Probation Office on the basis of these guilty pleas, the United States will recommend to the Court that such supervision be restored with no additional sanction.

12. This written agreement constitutes the complete agreement between the United States and the Defendant. The United States has made no promise or representations except as set forth in writing in this Agreement. The Defendant acknowledges that no threats have been made against the Defendant and that the Defendant is pleading guilty freely and voluntarily because the Defendant is guilty. Any modification of this Agreement shall be valid

only as set forth in writing in a supplemental or revised pleas agreement signed by all parties.

13. *Defendant's Signature*: I hereby agree that I have consulted with my attorney and fully understand all rights with respect to the pending matters. Further, I fully understand all rights with respect to the provisions of the *Sentencing Guidelines and Policy Statements* which may apply in my case. I have read this Agreement and carefully reviewed every part of it with my attorney. I understand this Agreement and I voluntarily agree to it.

Date: June 25, 1999 /s/ Webster L. Hubbell
WEBSTER L. HUBBELL
Defendant

14. *Defense Counsel Signature*: I am counsel for the Defendant in this case. I have fully explained to the Defendant the Defendant's rights with respect to the pending matters. Further, I have reviewed the provision of the *Sentencing Guidelines and Policy Statements* and I have fully explained to the Defendant the provisions of those Guidelines which may apply in this case. I have carefully reviewed every part of this plea agreement with the Defendant. To my knowledge, the Defendant's decision to enter into this Agreement is an informed and voluntary one.

Date: June 25, 1999 /s/ John W. Nields, Jr.
JOHN W. NIELDS, JR.
Counsel for Defendant

This Agreement executed on this 25th day of June, 1999.

Respectfully submitted,

/s/ KENNETH W. Starr by RWR
KENNETH W. STARR
Independent Counsel

/s/ Robert W. Ray
ROBERT W. RAY
Senior Litigation Counsel

/s/ David G. Barger
DAVID G. BARGER
Associate Independent Counsel

AGREED AND CONSENTED TO:

Date: June 25, 1999 /s/ Webster L. Hubbell
WEBSTER L. HUBBELL
Defendant

Date: June 25, 1999 /s/ John W. Nields, Jr.
JOHN W. NIELDS, JR., ESQ.
Counsel for Defendant

Date: June 25, 1999 /s/ Peter J. Romatowski
PETER J. ROMATOWSKI, ESQ.
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 98-0151 (JR)
UNITED STATES OF AMERICA

v.

WEBSTER L. HUBBELL,
Defendant.

COUNT ONE
(Willful failure to pay tax, 26 U.S.C. § 7203)

SUPERSEDING CRIMINAL INFORMATION

The United States by and through the Independent Counsel charges:

Count One

During the calendar years 1989-1992, 1994-1995, WEBSTER L. HUBBELL, the Defendant, had and received taxable income, on which taxable income there was due and owing to the United States of America, substantial income taxes. Defendant Hubbell was required by law on or before April 15, unless there was an extension, of each succeeding year, to pay the income taxes to the Internal Revenue Service for the preceding year. Between in or about December 1995 and October 1996, in the District of Columbia and elsewhere, including the Dis-

trict of Arkansas, WEBSTER L. HUBBELL, the Defendant, did knowingly and willfully fail to pay to the United States Department of the Treasury, Internal Revenue Service, a portion of the taxes due and owing, for Webster L. Hubbell for the calendar years 1989-1992, 1994-1995, in violation of Title 26, United States Code, § 7203.

/s/ Kenneth W. Starr
by David G. Barger
KENNETH W. STARR
Independent Counsel

Supreme Court, U.S.
FILED
NOV 24 1999
CLERK

(5)

No. 99-166

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's privilege against self-incrimination protects information previously recorded in voluntarily created documents that a defendant delivers to the government pursuant to an immunized act of production.

2. Whether a defendant's act of producing ordinary business records constitutes a compelled testimonial communication solely because the government cannot identify the documents with reasonable particularity before they are produced.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Mr. Hubbell is respondent in these proceedings. In addition, Suzanna W. Hubbell, Michael C. Schaufele, and Charles C. Owen were parties to the proceedings in the district court and the court of appeals. Ms. Hubbell, Mr. Schaufele, and Mr. Owen were notified of the pendency of these proceedings as required by Sup. Ct. R. 12.6. Thereafter, they did not notify the Clerk of their interest in remaining parties to this action.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
INTRODUCTION AND SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT EXTEND TO THE CONTENTS OF VOLUNTARILY CREATED DOCUMENTS SOLELY BECAUSE THE DEFENDANT IS COMPELLED TO PRODUCE THE DOCUMENTS TO THE GOVERNMENT	11
A. The Privilege Against Self-Incrimination Does Not Protect Information Contained in Voluntarily Created Documents	12
B. An Act of Production Does Not Automatically Taint the Contents of Voluntarily Created Documents Simply Because It Includes an Incriminating Testimonial Communication	17

TABLE OF CONTENTS—Continued

	Page
1. The Incriminating Testimonial Component of the Act of Production Does Not Automatically Taint the Contents of the Produced Documents	18
a. The Implications of *Fisher*	18
b. The Implications of the Later Cases	23
2. The Automatic-Taint Rule Announced by the Court of Appeals Is Inconsistent with *Schmerber* and Its Progeny	26
II. A DEFENDANT'S PRODUCTION OF ORDINARY BUSINESS RECORDS IN SPECIFIED CATEGORIES DOES NOT IMPLICATE THE FIFTH AMENDMENT WHEN THE DEFENDANT'S POSSESSION OF RECORDS OF THE SPECIFIED CATEGORIES IS A FOREGONE CONCLUSION	32
CONCLUSION	37

TABLE OF AUTHORITIES

Cases	Page
Baltimore City Dep't of Social Services v. Bouknight, 493 U.S. 549 (1990)	*passim*
Branzburg v. Hayes, 408 U.S. 665 (1972)	27
Boyd v. United States, 116 U.S. 616 (1886)	8, 13
Braswell v. United States, 487 U.S. 99 (1988)	20, 24-25
Doe v. United States, 487 U.S. 201 (1988)	14
Fisher v. United States, 425 U.S. 391 (1976)	*passim*
Gilbert v. California, 388 U.S. 263 (1967)	14
Holt v. United States, 218 U.S. 245 (1910)	14
Kastigar v. United States, 406 U.S. 441 (1972)	8, 27
Maryland v. Craig, 497 U.S. 836 (1990)	15
Pennsylvania v. Muniz, 496 U.S. 582 (1990)	14
Rochin v. California, 342 U.S. 165 (1952)	27
Schmerber v. California, 384 U.S. 757 (1966)	8, 14, 30-31
Segura v. United States, 468 U.S. 796 (1984)	21
United States v. Dionisio, 410 U.S. 1 (1973)	14
United States v. Doe, 465 U.S. 605 (1984)	*passim*
United States v. R. Enterprises, 498 U.S. 292 (1991)	28, 36-37
United States v. Wade, 388 U.S. 218 (1967)	14
White v. Illinois, 502 U.S. 346 (1992)	15
Wong Sun v. United States, 371 U.S. 471 (1963)	21
Constitutional Provisions, Statutes and Rules	
U.S. CONST. amend. V	*passim*
18 U.S.C. § 6002	*passim*
18 U.S.C. § 6003	3
28 U.S.C. § 1254	1
Sup. Ct. R. 12.6	ii
Miscellaneous	
Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986)	7
THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS (Neil H. Cogan ed. 1997)	16
Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968)	15, 29

TABLE OF AUTHORITIES—Continued

	Page
JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993)	27
WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE (2d ed. 1999)	13, 20, 27-28
LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968)	16
Kenneth J. Melilli, *Act-of-Production Immunity*, 52 OHIO ST. L.J. 223 (1991)	22
Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994)	16

IN THE

Supreme Court of the United States

No. 99-166

UNITED STATES OF AMERICA,
Petitioner,
v.
WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-112a) is reported at 167 F.3d 552. The opinion of the district court (Pet. App. 113a-140a) is reported at 11 F. Supp. 2d 25.

JURISDICTION

The judgment of the court of appeals was issued on January 26, 1999. Pet. App. 1a. The court denied a timely petition for rehearing and suggestion for rehearing en banc on May 4, 1999. Pet. App. 141a-143a. The petition for a writ of certiorari was filed on July 26, 1999. This Court granted the petition on October 12, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall be * * * compelled in any criminal case to be a witness against himself."

18 U.S.C. § 6002 provides in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States, * * *
>
> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

On April 30, 1998, a federal grand jury in the District of Columbia returned a ten-count indictment charging respondent and others with a variety of income tax-related offenses. J.A. 9-44. On July 1, 1998, the district court dismissed the indictment (as to all defendants) as beyond the jurisdiction of the Office of the Independent Counsel and also (as to respondent alone) as a violation of respondent's Fifth Amendment privilege against compelled self-incrimination. Pet. App. 113a-140a. On January 26, 1999, the court of appeals reversed both of those holdings and remanded the case to the district court for proceedings on the indictment. Pet. App. 1a-112a. The government sought review of that decision by this Court because the legal standard that the court of appeals articulated on the self-incrimination question made it infeasible for the government to bring respondent to trial.

1. The questions presented in this case arise from a subpoena that a federal grand jury in the Eastern District of Arkansas issued to respondent in 1996. The subpoena sought production of a variety of specified business and income records. *See* J.A. 46-53 (requiring production of, generally, bank records, calendars, phone records, and tax records). When respondent interposed a claim of privilege under the Fifth Amendment, the government obtained an order compelling production under 18 U.S.C. §§ 6002, 6003. J.A. 60-61. Thereafter, respondent appeared before the grand jury, produced a number of documents, and testified that the produced materials were the result of a complete search for documents responsive to the subpoena. Pet. App. 25a-26a; *see* J.A. 62-70 (respondent's testimony before the grand jury).

The government used the information contained in those documents, together with a variety of other investigative sources, to develop the various tax-related charges alleged in the indictment. Because all of the charges could be substantiated without the use of the documents produced by respondent or evidence that he possessed them, the government had no need to use the documents themselves at trial, although it did make substantial use of their contents in the investigation that led to the indictment. *See* Pet. App. 29a, 67a n.37.

2. The district court granted respondent's motion to dismiss the indictment on the ground that it violated his

Fifth Amendment privilege. Pet. App. 128a-137a.[1] The district court acknowledged the firmly established rule "that the contents of voluntarily prepared documents are never protected by the Fifth Amendment privilege" (Pet. App. 131a), but ruled nonetheless that the Constitution would not permit the government to use the contents of those documents that respondent produced. The court rested its ruling on the view that respondent's production of the documents constituted an implicit testimonial assertion of the existence of those documents. Pet. App. 133a-137a.

The district court did not reject the government's assertion that the government already knew that respondent maintained records of the types subpoenaed. Nor did the district court indicate any respect in which it was incriminating for respondent to admit through his act of production that the documents existed. Nevertheless, the court held that the contents of the documents were protected by the Fifth Amendment privilege unless the government could establish that it already was aware of "the existence of the information contained in the documents." Pet. App. 137a n.15.

3. The government appealed, and the Department of Justice appeared as an *amicus curiae* urging reversal of the district court's decision on the Fifth Amendment issue.[2] The court then unanimously rejected the district court's holding that the government could not use the contents of the documents unless the government could establish that it already was aware of the contents. Pet. App. 36a

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[1] The district court also dismissed the indictment as beyond the jurisdictional authority of the Office of the Independent Counsel. Pet. App. 114a-127a.

[2] The court of appeals reversed the district court on the jurisdictional issue. Pet. App. 2a-22a. No party has sought further review of that question.

n.23. But the panel divided on the question of exactly what the government must establish in order to use the contents of the documents.

a. The majority of the panel first considered whether the production of the documents was sufficiently testimonial to constitute a compelled testimonial communication. Pet. App. 36a-62a. On that point, the court rejected the government's contention that respondent's production of the documents did not rise to the level of testimony because the existence of the documents was a foregone conclusion. *Compare Fisher v. United States*, 425 U.S. 391, 411 (1976) (explaining that the production of documents is not a testimonial communication if their existence is a "foregone conclusion"). The panel ultimately concluded that the existence of documents is not a foregone conclusion for purposes of the Fifth Amendment unless the government can "demonstrat[e] with reasonable particularity a prior awareness that the * * * documents sought in the subpoena existed and were in [the defendant]'s possession." Pet. App. 62a.

The court also rejected the government's view that production of the documents was not incriminating (a view that rests on the idea that respondent admitted at most that he possessed several classes of customary business records). Building on its analysis of the foregone conclusion question, the court determined that the act of production would be incriminating if the existence of the produced documents was not a foregone conclusion or if the act of production would authenticate those documents. Pet. App. 62a-65a.

Having concluded that the act of production in this case involved incriminating testimonial communications, the court turned to the larger question—the extent to which incriminating communications implicit in the act of pro-

duction can taint theretofore unprivileged contents of documents that a defendant produces under compulsion. Pet. App. 65a-72a. The court began by identifying the "testimony" that is sometimes implicit in the act of production: that the documents exist, that the defendant has them in his possession, and that they are authentic. It then broadly held that the implicit testimony that documents exist always taints the contents of the documents, reasoning that the contents are "derived" from that implicit testimony for purposes of the Fifth Amendment. The court extended that rule even to cases (like this one) in which the existence of the documents themselves (as distinguished from the information that they contained) was irrelevant to the investigation and would be irrelevant to any trial of the charges contained in the indictment. The court explained that, in its view, a contrary holding "essentially eviscerates the act of production doctrine." Pet. App. 68a.

b. Judge Williams dissented from the court's analysis of the Fifth Amendment questions. Pet. App. 100a-12a. In his view, this Court's decision in *Fisher* compelled the conclusion that the existence of the documents was a foregone conclusion, because "these papers' own physical presence [wa]s 'self-evident' at the time and place of production and so long thereafter as the government maintains proper custody." Pet. App. 105a. As he explained, "[t]he particular documents' existence speaks for itself once they have been delivered." Pet. App. 106a.

Judge Williams also disputed the majority's conclusion that the testimonial aspects of the act of production tainted the contents of the documents. He explained: "[T]he act of production doctrine shields the witness from the use of any information (resulting from his subpoena response) beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office

unsolicited and unmarked, like manna from heaven." Pet. App. 111a (citing DOJ Amicus Br. at 42; Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 59-60 (1986)).

4. Because the standard articulated by the court of appeals made it infeasible to bring respondent to trial, and in view of the practical and legal significance of the court's analysis, the government filed a petition for rehearing and a suggestion for rehearing en banc.[3] The court of appeals denied the petition for rehearing, with Judge Williams dissenting. Pet. App. 141a. With two judges recused, the nine-member court denied the suggestion for rehearing en banc over the dissent of four judges. Pet. App. 142a-143a.

5. On June 30, 1999, after the mandate issued from the court of appeals, respondent entered a conditional guilty plea to a superseding information covering conduct related to the indictment in this case. J.A. 104-115; *see* J.A. 116-17 (text of superseding information). That agreement includes a commitment by the government that it will move to vacate respondent's conviction if this Court resolves this case in a way that "fails materially to improve the United States's position to the point that it is reasonably likely that [respondent]'s act of production immunity does not pose a significant bar to his prosecution." Conversely, if the Court accepts our position in this case, then the judgment of conviction will not be vacated. J.A. 106-07.

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[3] In response to a call for its views from the court of appeals, the Department of Justice filed a brief supporting the suggestion for rehearing en banc.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." At the same time, 18 U.S.C. § 6002 permits the government to compel self-incriminating testimony, so long as the government grants the witness immunity that is "coextensive" with the Fifth Amendment privilege. *Kastigar v. United States*, 406 U.S. 441, 452-53 (1972). Here, respondent produced information under the compulsion of Section 6002. The fundamental question then is whether that information is derived from some compelled testimonial aspect of respondent's act of production, thereby compelling respondent to be a witness against himself. Our answer—that the information is not derived from governmental compulsion because the government will make no use of the testimonial aspects of respondent's act of producing that information—follows from the text of the Fifth Amendment, and this Court's decisions construing the privilege against self-incrimination.

1. The Constitution affords no general Fifth Amendment protection to the contents of voluntarily recorded documents. The Court's decisions in *Fisher* and in *United States v. Doe*, 465 U.S. 605 (1984), substantially rejected the contrary decision in *Boyd v. United States*, 116 U.S. 616 (1886). Those decisions extended to the context of documents a lengthy line of cases (originating with *Schmerber v. California*, 384 U.S. 757 (1966)), which generally recognize that the Fifth Amendment permits investigative techniques that do not compel testimonial communication.

The decisions in *Fisher* and *Doe* reflect the textual limitations of the Fifth Amendment privilege and the difficulty of extending the privilege to cases in which the defendant is compelled only to produce documents. Em-

bodied in the Clause's use of the phrase "to be a witness" is a limitation that takes on particular significance when contrasted with the markedly broader language used in the contemporaneous state bill of rights provisions from which the Fifth Amendment was drawn. Those provisions, which more broadly prohibited compulsion to "give evidence," are much more readily applied to the production of documents than the language of the Fifth Amendment itself.

The view of the court of appeals—that *any* incriminating testimonial communication automatically taints the contents of the produced documents and bars any investigatory or prosecutorial use of those contents—is at odds with the clear determination of the majority in *Fisher* and *Doe* and disrupts the settled fabric of Fifth Amendment law. In *Fisher* and *Doe*, the Court held that the contents of documents generally are not protected by the Fifth Amendment. Here the court of appeals has, in effect, adopted the absolutist position Justice Marshall articulated in his opinion concurring in the judgment in *Fisher*. But in *Fisher* and *Doe* the Court adopted a more balanced view, under which the government often would be able to use the contents of compelled documents.

At a minimum, the government should be able to use the contents of compelled documents unless there is some substantial relation between the compelled testimonial communications implicit in the act of production (as opposed to the act of production standing alone) and some aspect of the information used in the investigation or the evidence presented at trial. Absent such a relation, it makes no sense to conclude that the documents are "derived" from the compelled testimonial communications in any way.

Stated differently, the act of production itself cannot taint the contents of the documents produced; the Fifth

Amendment is offended only if the government somehow relies on a testimonial aspect of respondent's production of the documents—by arguing, for example, that his production of the documents proves that he possessed them. In this case, none of the compelled testimonial communications are relevant to any aspect of the investigation or proof of the charges: The government need not make any use of respondent's admission that he possessed the documents, that the documents were authentic, or that the documents ever existed. In short, *nothing* resulted from the act of production alone that in any way compelled respondent to be a "witness" against himself. In these circumstances, the privilege does not prohibit the government from making investigative use of the preexisting, voluntarily created contents of the documents.

The distinction between the protected testimonial communications and the unprotected nontestimonial act of production itself is not a mere formality. It rests directly on the framework that the Constitution provides to regulate criminal investigation. That framework does not (and could not sensibly) reflect a general distrust of investigatory actions by the government, even when those actions extract evidence from the target of an investigation. The Constitution includes separate and specific provisions that bar certain types of investigatory activity—precluding, for example, unreasonable intrusions on interests protected by the Fourth Amendment and forced testimonial communication proscribed by the Fifth Amendment. Outside those bounds, the government is free to use its powers of compulsion, subject to the more general restrictions of the Due Process Clause. Thus, it is central to this case that the information contained in the documents produced was recorded by respondent (or others) voluntarily—not under compulsion—and that the government obtained that information not through the forbidden tactic of compelling

respondent to restate it or affirm its accuracy, but through the entirely permissible tactic of compelling him to produce the physical evidence containing the information.

2. The case also presents a narrower question: whether the act of production in this case included any admission that constituted an "incriminating communication." On that question, the case is controlled by *Fisher v. United States*, 425 U.S. 391 (1976). In *Fisher*, this Court concluded that the mere production of documents did not implicate the privilege because the defendant's possession of those documents was a "foregone conclusion." This case, like *Fisher*, involves a subpoena that seeks production of typical and customary business records (including tax and bank account records), which the government naturally would expect a businessman, like respondent, to maintain. Under *Fisher*, respondent's production of such ordinary business records is not sufficiently testimonial to implicate the Fifth Amendment. The contrary conclusion of the court of appeals is incorrect.

ARGUMENT

I. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT EXTEND TO THE CONTENTS OF VOLUNTARILY CREATED DOCUMENTS SOLELY BECAUSE THE DEFENDANT IS COMPELLLED TO PRODUCE THE DOCUMENTS TO THE GOVERNMENT

The compelled testimonial communication implicit in an act of production does not taint the otherwise unprivileged, voluntarily created, pre-existing contents of the documents produced. This is the case whenever the government makes investigative use of the contents of documents compelled under 18 U.S.C. § 6002 but does not need to rely on a defendant's testimonial communication

to prove his possession of the documents, the existence of the documents or their authenticity.

Our analysis proceeds in two steps. First, it is now well-established that the Constitution does not directly protect the information contained in voluntarily recorded documents. Respondent attempts to avoid the implications of that point by arguing that the government's possession of the information is derived from the compelled act of production. Our second point rebuts that attempt: Information that previously has been recorded voluntarily before compulsion is brought to bear cannot sensibly be treated as the fruit of any testimonial communication implicit in the act of production. The government obtains that information directly from the physical act of production—an act that the Fifth Amendment does not protect—and it in no sense is derived from respondent's compelled testimony.

A. The Privilege Against Self-Incrimination Does Not Protect Information Contained in Voluntarily Created Documents

For more than two decades, it has been clear that the Self-Incrimination Clause does not protect a defendant against incrimination by information that the defendant (or others) voluntarily has recorded in a document. Thus, as the Court explained in *Doe*, when "the preparation of * * * papers * * * [i]s wholly voluntary, * * * they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." 465 U.S. at 611. Stated most directly: "a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." *Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 555 (1990); *see also Doe*, 465 U.S. at 618 (O'Connor, J., concurring) ("[T]he Fifth

Amendment provides absolutely no protection for the contents of private papers of any kind.").

This Court's decisions in *Doe* and *Fisher* reflect the considered rejection of a much older line of authority which recognized a general constitutional protection for private papers. *See, e.g., Boyd*, 116 U.S. at 630; *Doe*, 465 U.S. at 618 (O'Connor, J., concurring) ("The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd*."). In recent decades, the Court repeatedly and explicitly has criticized the rationale of *Boyd* and rejected its holdings. Thus, the Court in *Fisher* rejected the "proposition"—which the Court attributed to *Boyd*—"that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate." 425 U.S. at 405. The Court explained that "[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time," *id.* at 407, that "the foundations for the rule [of *Boyd*] have been washed away," *id.* at 409, and that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment," *id.* Although the Court has yet to expressly overrule *Boyd*, it is now clear that "very little, if anything, remains of *Boyd*'s Fifth Amendment analysis." WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 8.12(a), at 8-526 (2d ed. 1999) (forthcoming) [hereinafter LAFAVE, ISRAEL & KING] (internal quotation omitted).

In rejecting *Boyd*, this Court has established beyond any doubt that the Fifth Amendment "does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher*, 425 U.S. at 408. Thus,

the Court repeatedly has held that the Fifth Amendment does not prohibit the compulsory production of physical evidence, even when that production necessitates a witness's physical act. The forced collection of blood samples (*Schmerber*, 384 U.S. at 763-65), handwriting exemplars (*Gilbert v. California*, 388 U.S. 263, 266-67 (1967)), and voice exemplars (*United States v. Dionisio*, 410 U.S. 1, 5-7 (1973)) are all permitted. The Amendment also permits compelled participation in a lineup (*United States v. Wade*, 388 U.S. 218, 221-23 (1967)), the compelled completion of a bank disclosure form (*Doe v. United States*, 487 U.S. 201, 207-14 (1988)), the forced production of a child, even if examination of the child might reveal incriminating information (*Bouknight*, 493 U.S. at 554-555), the forced display of potentially incriminating attire (*Holt v. United States*, 218 U.S. 245, 252-53 (1910)), and the videotaping of slurred speech probative of a defendant's sobriety (*Pennsylvania v. Muniz*, 496 U.S. 582, 590-92 (1990)). All these cases make clear that nontestimonial physical acts may be distinguished from their implicit testimonial components and that compelling the acts themselves is not proscribed by the Fifth Amendment.

Applying that same reasoning, the Court in *Fisher* concluded that the Constitution permits the enforcement of a document subpoena. The Court acknowledged that the enforcement of the subpoena "without doubt involves substantial compulsion." 425 U.S. at 409. Still, the Court reasoned:

> [I]t does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, *for the privilege protects a person only against being incriminated by his own compelled testimonial communications. Id.* at 409 (emphasis added).

As Justice Powell later explained in *Doe*, "[w]here the preparation of business records is voluntary," the privilege is not implicated because "no compulsion is present." 465 U.S. at 610. Given the concession of the respondent in *Doe* that the documents were created voluntarily, the Court concluded that "[t]he fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged." *Id.* at 612.

The Court's conclusion that the privilege does not protect the contents of voluntarily created documents is well-grounded in the text of the Fifth Amendment. The crucial phrase in the Self-Incrimination Clause bars only compulsion that results in respondent "be[coming] a witness against himself." It is at best a strain to treat the act of producing documentary evidence as "be[ing] a witness." The words, on their face, most naturally refer to the delivery of oral testimony. *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 676 (1968) ("The picture immediately conveyed is of a defendant on trial for crime being dragged, kicking and screaming, to the stand or, more realistically, being imprisoned for refusal to testify."); *see also White v. Illinois*, 502 U.S. 346, 358-60 (1992) (Thomas, J., concurring) (discussing the meaning of the word "witness" at the time of the Bill of Rights) (quoting *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting)).

If the Framers of the Bill of Rights had intended to extend the privilege to *any* compelled production of evi-

dence, the existing state constitutions provided conspicuously broader models. The most common phrasing provided that a person could not "be compelled to give evidence against himself." *See* DEL. DECL. OF RIGHTS § 15 (1776); MD. DECL. OF RIGHTS art. 20 (1776); N.C. DECL. OF RIGHTS § VII (1776); PA. CONST., art. IX, § IX (1790); VA. DECL. OF RIGHTS art. VIII (1776); and VT. CONST. ch. I, art. 10 (1777), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 328-30 (Neil H. Cogan ed. 1997) [hereinafter Cogan, ORIGINS].[4] In drafting the Fifth Amendment, Madison used narrower language seemingly limited to actions that actually make the accused a "witness" against himself.[5]

Although neither the language of the Constitution nor the Court's emphatic rejection of *Boyd* in *Fisher* and *Doe* directly addresses the reasoning of the court of appeals, the vigor of the Court's analysis in those cases casts grave doubt on the court of appeals's decision. That decision

[4] This language apparently was drafted by George Mason for the Virginia Declaration of Rights and taken from that document for use in the other states. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 405-10 (1968); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1118-20 (1994). Massachusetts and New Hampshire used a slightly different phrasing, providing that a person could not be compelled "to accuse" or to "furnish evidence against" himself. MASS. CONST. pt. I, art. XII (1780); and N.H. CONST. pt. I, art. 15 (1783), *reprinted in* Cogan, ORIGINS, at 328-29.

[5] The significance of Madison's choice to prohibit only actions that made the accused a "witness" is underscored by the frequency with which state proposals for a federal bill of rights used the broader "give evidence" language. *See* N.Y. Proposal, July 26, 1788; N.C. Proposal, Aug. 1, 1788; Pa. Minority Proposal, Dec. 12, 1787; R.I. Proposal, May 29, 1790; and Va. Proposal, June 27, 1788, *reprinted in* Cogan, ORIGINS, at 326-28. *See generally* Moglen, *Taking the Fifth*, 92 MICH. L. REV. at 1121-22.

effectively resurrects the now-discarded result in *Boyd* and sweeps the production of most—if not all—documentary evidence back within the ambit of the Fifth Amendment privilege.

B. An Act of Production Does Not Automatically Taint the Contents of Voluntarily Recorded Documents Simply Becaues It Includes an Incriminating Testimonial Communication

Starting from an unexceptional premise—the possibility, recognized in *Fisher* and *Doe*, that acts of production might involve incriminating testimonial communications—the court of appeals proceeded to the dubious conclusion that the contents of documents automatically are tainted in any case in which the act of production involves such a communication. Thus, while the court of appeals, of course, did not directly revive *Boyd* and hold that the contents of voluntarily recorded documents are directly protected by the Fifth Amendment privilege, it nevertheless did so indirectly.

It is important to emphasize the breadth of the court of appeals's holding. The scope of the automatic taint rule adopted by the court below is clearest from the passage at Pet. App. 71a, where the court declared generally that "*Kastigar* forbids the derivative use of the information contained [in documents produced under compulsion] against the immunized party"; *see also* Pet. App. 56a-57a n.33 (concluding that the government's "*a posteriori* knowledge [of compelled documents] is inextricably linked with the communicative testimony inherent in the subpoena response"). That language reflects the view of the court of appeals regarding whether an act of production involves a testimonial communication of sufficient incriminating force to implicate the Fifth Amendment. And the only qualification of that broad statement is a limita-

tion of the holding to cases in which "the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence," Pet. App. 71a. Significantly, in the view of the court of appeals, there are *no* cases in which the voluntarily created contents of the produced documents will not be entirely privileged whenever the defendant's compelled act of production also involves an incriminating testimonial communication.

As we explain in Point II below, the court of appeals erred in concluding that the act of production in this case involved such a communication. But the more serious error is the holding that any such communication automatically taints the theretofore unprotected, voluntarily created contents of the documents. The reasoning of the court of appeals on that point undermines the decisions of this Court in *Fisher* and *Doe* and, more generally, ignores the reasoning and implications of this Court's decision in *Schmerber*.

1. *The Incriminating Testimonial Component of the Act of Production Does Not Automatically Taint the Contents of the Produced Documents*

a. *The Implications of* Fisher

The Court, in *Fisher*, recognized that "[t]he act of producing evidence in response to a subpoena * * * has communicative aspects of its own, wholly aside from the contents of the papers produced." 425 U.S. at 410. For example, "[c]ompliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer." *Id.*; *see also id.* at 413 (discussing the possibility that compliance with a subpoena would authenticate the produced documents). By noting that the privilege extended to those kinds of tacit testimonial communications, the Court suggested that

the privilege would prevent the government from using such a compelled tacit communication against the defendant. *See id.* at 413. For this reason, the Court in *Fisher* did not articulate an absolute "no-taint" rule—that the government would never be prohibited from using the contents of voluntarily produced documents. Rather, the Court recognized that there might be a class of cases where the government's use of the contents is derived from some testimonial component of the act of production.

But the Court made it equally clear that those tacit testimonial communications would be irrelevant in cases in which "[t]he existence and possession or control of the subpoenaed documents" were not "in issue," *id.* at 412—that is, where there was no nexus between the testimonial communications and the government's use of the voluntarily created contents of the documents produced. Not a single word of the *Fisher* opinion supports the view of the court of appeals—that the Court's recognition of the relatively inconsequential testimonial concessions implicit in the act of production was designed to resurrect the specter of *Boyd* by automatically tainting the contents of the produced documents.

Indeed, the only substantial precedential support for the court of appeals's decision lies in the opinion of Justice Marshall, concurring in the judgment in *Fisher*. Proposing an understanding of the Court's opinion much like that of the court of appeals, Justice Marshall argued that the implicit testimony of existence would "effectively shield the contents of the document, for the contents are a direct fruit of the immunized testimony that the document exists." 425 U.S. at 434 (Marshall, J., concurring in the judgment).

The reductive nature of Justice Marshall's reading of *Fisher* is evident from his frank acknowledgment that he

was "hopeful that the Court's new theory * * * will provide substantially the same protection as our prior focus on the contents of the documents." 425 U.S. at 432 (Marshall, J., concurring in the judgment); *see* LaFave, Israel & King, § 8.13(c), at 8-605 ("As a practical matter, since act-of-production immunity would usually be needed because of uncertainty as to existence and possession, Justice Marshall's view ordinarily would remove the document from consideration in any possible prosecution of the person who produced it with act-of-production immunity."). Because Justice Marshall was unwilling to join the opinion of the Court, and because his views did not attract any Member of the Court who did join *Fisher*, his opinion is hardly a reliable guide to the meaning of the Court's decision.[6]

The vigor of *Fisher*'s criticism of *Boyd* suggests that Justice Marshall's automatic-taint view is just as unacceptable as the opposing "no-taint" view. The former overemphasizes the importance of the communicative aspects of an act while the latter ignores those aspects altogether. Resolution of this case turns on defining the boundary of the intermediate question left open by *Fisher*—precisely when is it sensible to say that the government's use of the contents of documents produced under compulsion is derived from a testimonial communication implicit in the act of production? *Fisher* did not address the issue because that subpoena did not involve any testimonial communication subject to the Fifth Amendment. *See* 425 U.S. at 414.[7] That issue is presented here.

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[6] Justice Marshall's subsequent determination to join Justice Kennedy's dissent in *Braswell v. United States*, 487 U.S. 99 (1988), suggests that even Justice Marshall did not long retain the view of *Fisher* that he expressed at the time.

[7] Nor did *Doe* resolve the issue. In *Doe*, production of the documents at issue had not yet been compelled. *See* 465 U.S. at 607-08.

The appropriate resolution of that issue should give force to both this Court's strong criticism of *Boyd* and its recognition of the testimonial implications of the act of production. Thus, the privilege is not infringed unless there is some substantial relation or connection between the compelled testimonial communications and some aspect of the information used in the investigation or the evidence presented at trial. *Cf. Segura v. United States*, 468 U.S. 796, 815 (1984) (requiring significant causal connection to alleged government misconduct before suppression); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (same). To put it more directly, the privilege applies *only* if some information used by the government is the fruit not only of the compelled physical act of production, but, more specifically, of the compelled testimonial communications implicit in that act. In the language of *Fisher*, the testimonial communications inherent in an act of production infringe upon the Fifth Amendment privilege only in cases in which an aspect of those communications is "*in issue*," 425 U.S. at 412 (emphasis added).

To be sure, there are several classes of cases in which the privilege would, under that construction, apply. The classic case, for example, would be a prosecution in which the defendant's possession of the documents at the time of the subpoena was "in issue" because the government needed to prove his knowledge of their contents. *Cf. Bouknight*, 493 U.S. at 555 ("her implicit communication of control over Maurice at the moment of production might aid the State in prosecuting Bouknight"). *Fisher* would bar use of this act of production to prove a defendant's possession. Another obvious example would be a case in which the government received a stack of documents that could be identified only by the nature of the production: for example, a stack of papers covered only

with numbers produced in response to a subpoena calling for "records of all of the contributions that you have received from" specified individuals. *Fisher* would prevent the government from using the defendant's admissions to establish the meaning and significance of the documents which it can discern only from defendant's act of production.

Here, however, neither the information used in the government's investigation, nor the evidence that would have been presented at trial, depends in any way on respondent's implicit testimonial communications that the documents exist, that they are authentic, or that he possessed them. Respondent's implicit testimony that the documents existed is irrelevant here because the government would not need to prove the existence of the particular documents to establish the charges in the indictment. The irrelevance of any implicit authentication of the documents or evidence of respondent's control of the documents is even clearer. Neither the investigation nor the prosecution of respondent is derived, directly or indirectly, from any information contained in respondent's compelled testimonial communications, as distinguished from the voluntarily recorded information contained in the documents that he produced.[8] Thus, aside from the automatic-taint view advanced by Justice Marshall in *Fisher,* there

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[8] As one commentator explains:

> [W]here the government uses the contents solely to establish something other than the very testimonial fact which rendered the act of production privileged, such use is outside the ambit of derivative use and is permitted. In these circumstances, although there may very well be a tenuous causal connection between the immunized act of production and the government's use of the produced items, that connection is *too attenuated to be afforded legal significance.*

Kenneth J. Melilli, *Act-of-Production Immunity,* 52 OHIO ST. L.J. 223, 261 (1991) (footnote omitted) (emphasis added).

is no plausible basis for application of the privilege in this case.

b. *The Implications of the Later Cases*

Although none of the Court's cases has directly resolved the question raised by *Fisher* and presented in this case, the analysis of the Court in subsequent cases and the assumptions that appear to underlie its reasoning cast grave doubt on the automatic-taint rule of the court of appeals and bolster a more measured understanding of *Fisher.*

This Court, in *Doe,* specifically responded to a claim identical to the claim presented here—that testimonial communications implicit in the act of production automatically bar the use by the government of the contents of the produced documents—and dismissed "this contention" as "unfounded." 465 U.S. at 617 n.17. The Court explained that immunity "need be only as broad as the privilege against self-incrimination," and that "the privilege in this case extends only to the act of production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records." *Id.*[9] To be sure, it is conceivable that the Court's phrasing was intended to convey that the "self-incrimination that might accompany the act of producing his business records" automatically would taint the contents of the documents, but the unadorned rejection of this very result as "unfounded" earlier in the text of the same footnote makes

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[9] The quoted language appears in a case in which the Court already had concluded that it was bound by the lower court findings that the subpoena in question involved an incriminating testimonial communication. *See* 465 U.S. at 613-14. Thus, the *Doe* Court considered a situation, similar to the one we presume for purposes of this portion of our analysis, in which the defendant had made a sufficiently substantial testimonial communication to call the Fifth Amendment privilege into play.

that reading strained at best.[10] As with *Fisher,* the only plausible reading of the opinion is this: The contents of voluntarily created documents are not derived from the testimonial communications implicit in the subsequent act of production, and thus are not tainted by the compelled nature of those communications. *See also Doe,* 465 U.S. at 618 (O'Connor, J., concurring) ("[T]he Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."). The taint can come only from some specific use of the defendant's compelled testimonial communications—not his physical acts.

The Court's more recent opinions in *Braswell* and *Bouknight* provide further support for our reading of *Fisher* and *Doe*. In *Braswell,* the Court considered whether a closely held corporation should be treated as an individual (and thus entitled to assert the Fifth Amendment privilege) or like a public corporation (which has no privilege). Although the Court divided 5-4 on that question, the Justices were of one mind on the point relevant to this case: The contents of documents were unprivileged even after their compelled production. The Court (per Rehnquist, C.J.) explained that "[t]here is no question but that the contents of the *subpoenaed* business records are not privileged." 487 U.S. at 102 (emphasis added). Although the Court discussed the effect of immunity at length, it never qualified that absolute statement to suggest that the incriminating testimonial communications implicit in the act of production somehow would taint those contents and extend the privilege to them. Justice Kennedy's dissent (joined by Justices Brennan, Marshall, and Scalia) makes the point more broadly, stating that "the contents

[10] It also seems implausible to suggest that the author of the Court's opinion in *Doe* simply forgot or disregarded the significance of the opinion that he had written for the Court several years earlier in *Kastigar.*

of business records prepared without compulsion can be used to incriminate even a natural person *without implicating Fifth Amendment concerns.*" *Id.* at 120 (emphasis added). For the dissenters, "the contents of business records produced by subpoena are not privileged under the Fifth Amendment, absent some showing that the documents were prepared under compulsion." *Id.* at 121. Both the majority and the dissent refer to documents that the government would obtain under a compelled act of production, and both describe the contents as unprivileged, a consensus that simply cannot be reconciled with the automatic-taint rule of the court of appeals.

Finally, the Court's analysis in *Bouknight* conflicts with the decision below. In that case, the Court considered an order compelling production of a minor child. The Court recognized the possibility that production of the child would lead to the discovery of incriminating evidence, but dismissed that concern as insignificant:

> When the government demands that an item be produced, the only thing compelled is the act of producing the item. The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced. But a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the things demanded. Bouknight therefore cannot claim the privilege based upon anything that examination of Maurice might reveal, nor can she assert the privilege upon the theory that compliance would assert that the child produced is in fact Maurice. 493 U.S. at 554-55 (alteration, internal quotation, and citations omitted).

Again, it is possible to find an alternative explanation for the ultimate decision—the Court also relied heavily on

the significance of the state's regulatory regime related to children, 493 U.S. at 556-61—but a Court interpreting *Fisher* as respondent does could not have characterized so blithely the ability of the government to use information derived from the act of producing the child.

* * * *

There is no square holding or precise statement by this Court adopting our understanding of *Fisher* and *Doe* and the implications of the Court's rejection of the antiquated *Boyd* precedent. But the Court's consistent, repetitive, and emphatic statements that the voluntarily created contents of documents are not privileged—even documents produced under a compulsion that involves a testimonial communication protected by the Fifth Amendment—is flatly inconsistent with the view that any such communication "inextricably" (Pet. App. 56a-57a n.33) taints those contents.

2. *The Automatic-Taint Rule Announced by the Court of Appeals Is Inconsistent with* Schmerber *and Its Progeny*

The erroneous reasoning embraced by the court of appeals starts with its unwillingness to grapple with the logical implications of the line of decisions that begins with *Schmerber*. Both of the lower courts proceeded from the perspective that the Constitution generally is hostile to investigative practices that allow the government to build a case against a defendant based on evidence taken from the defendant involuntarily. *See* Pet. App. 49a-50a (court of appeals refers to "the anti-extortion principle which has become the motivating force of self-incrimination doctrine"); Pet. App. 137a (district court criticizes the government for "turn[ing]" respondent "into the primary informant against himself").

That perspective reflects a fundamental misapprehension of the scope of the constitutional limits on the in-

vestigation of criminal activity. "[T]he Court has never on any ground * * * applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which * * * did not involve compelled testimonial self-incrimination." *Fisher*, 425 U.S. at 399; *see also Doe*, 465 U.S. at 611 n.8. Thus, the Constitution includes specific limitations on governmental investigatory practices, the most important of which are the Fourth Amendment's requirement that searches and seizures be reasonable and the Fifth Amendment's prohibition of compelled self-incrimination. But outside those two areas, and subject to the general protections of the Due Process Clause, *see Rochin v. California*, 342 U.S. 165, 168-74 (1952), there is no general limitation on the government's power to collect evidence from the targets of its investigations.

If the government wishes to search an individual's premises, it either must show probable cause sufficient to justify a warrant or present some justification adequate to excuse the absence of a warrant. But if—as in this case—it chooses not to invade the defendant's premises with a nonconsensual search, then the government can rely on "the long standing principle that 'the public has a right to every man's evidence.'" *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (ellipsis omitted); *see also* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 40-41 (1993) (discussing the view, dating to Bentham, that "an intrusive search * * * seems more 'cruel' than requiring suspects * * * to answer questions").

The grand jury's authority to compel the production of evidence is "[a]mong the necessary and most important of the powers * * * [that] assure the effective functioning of government in an ordered society." *Kastigar*, 406 U.S. at 444 (internal quotation omitted). As one leading treatise explains, in a society without a general obligation to provide evidence, "criminal activity could be hidden be-

hind a wall of silence that finds no justification in legal privilege." LAFAVE, ISRAEL & KING, § 8.6(a), at 8-254. Because the grand jury obtains evidence without the privacy-invading intrusions regulated by the Fourth Amendment, it generally is entitled to evidence free from any restraint comparable to the necessity of showing probable cause. *See United States v. R. Enterprises*, 498 U.S. 292, 297 (1991); LAFAVE, ISRAEL & KING, § 8.6(a), at 8-255.

As a result, provided that the method does not violate the Fourth Amendment or involve the compulsion of a testimonial communication protected by the Fifth Amendment, the Court regularly has countenanced the use of procedures by which the government compels the target of an investigation to provide incriminating evidence. The most prominent example is *Schmerber*, which rejected application of the privilege against self-incrimination to the forcible collection of a blood sample. And *Schmerber* is not an outlier limited by later decisions. To the contrary, it has been the fount of a long string of cases permitting the involuntary collection of evidence in a wide variety of circumstances. *See supra* page 14 (citing cases that have extended *Schmerber*'s reasoning). As a result, modern police practice is founded on the government's authority to compel the production of physical evidence.

Thus, it is not enough for respondent to rely solely on what we concede—that the incriminating evidence was derived from the documents that respondent produced. Rather, the privilege prevents the government's use of the contents of the documents only if two additional circumstances are present: (i) an implicit incriminating testimonial communication—something that, as we argue in Point II, this case does not involve; and (ii) a determination that the voluntarily created information contained in the documents produced is derived from that communi-

cation. On the latter point respondent's case definitively falters: Whatever the Court might conclude about some trivial testimonial communication implicit in respondent's act of producing the documents in this case, it is not plausible to contend that the information contained in those documents—voluntarily recorded by respondent (or others) long before compulsion was brought to bear—somehow is derived from that communication.

We readily agree that the government has the documents—and the information that they contain—because respondent gave them to the government. But the government's possession of the documents is the fruit *only* of a simple physical act—the act of producing the documents. The contrary view—that the documents are derived from some testimonial communication—rests on the tortured notion that the government obtained the documents not through the physical act of production, but through respondent's implicit testimonial admission that the documents existed, an admission that is irrelevant to any substantive issue. As the opinion of the court of appeals illustrates, that line of reasoning is almost Thomist in its unremitting insistence on turning the focus of analysis from the material and physical world to an invisible and metaphysical conceptual system. *See also* Friendly, *Fifth Amendment Tomorrow*, 37 U. CIN L. REV. at 702 (arguing that the reliance on testimonial assertions implicit in the act of production to justify application of the privilege in *Boyd* "reeks of the oil lamp").

The conceptual error infecting the opinion of the court of appeals is that it collapses the non-testimonial physical act of production into the incidental testimonial admissions sometimes implicit in the act of production. The court seemed to equate the fact that the documents exist with a testimonial communication asserting that existence. Thus, the court of appeals views document production as

a primarily testimonial matter, with some incidental unprivileged physical activity occurring on the side. *See, e.g.*, Pet. App. 50a n.31 ("[The act of producing documents] provides testimony *rather than* physical or real evidence.") (emphasis added). Yet, the dispositive portion of the opinion (Pet. App. at 65a-72a) simply ignores the rule that the Fifth Amendment does not protect the contents of voluntarily created documents. The clear analysis of *Fisher*—which imports the *Schmerber* analysis to the area of document production, and firmly rejects the *Boyd* notion that the Fifth Amendment should limit the government's access to this type of evidence—cannot be reconciled with the reasoning of the court of appeals.

The illogical implications of the D.C. Circuit's analysis are perhaps clearest in the pivotal, concluding portion of its analysis. There, the majority defends its interpretation of the Fifth Amendment by describing this as a case in which "the testimonial value of document production is high, and the government obtains a large quantum of information directly from the witness's mental faculties." Pet. App. 70a-71a. That analysis is entirely wrong. The act of production in this case has absolutely no evidentiary value—to prove the tax charges in the indictment, the government would not have needed to establish that *any* of the documents existed or were authentic, let alone that the defendant was in possession of them or produced them to the government—and the government is not exploiting any information obtained from compelled exercise of the witness's mental faculties. What was compelled was the physical act of production, which revealed nothing of significance about respondent's mental faculties; what revealed information of significance about his mental faculties (the contents of the documents) was not compelled. *Compare Schmerber*, 384 U.S. at 763 (explaining that, whatever the policies of the privilege might suggest in the

abstract, the constitutional privilege always has forbidden only "the cruel, simple expedient of compelling [evidence] from [the defendant's] own mouth") (internal quotation omitted); *see also Fisher*, 425 U.S. at 412 (the Fifth Amendment does not limit the compelled production of documents in cases in which "the existence and possession or control of the subpoenaed documents [are] no more in issue * * * than in the above cases").

Finally, although not strictly relevant—because it is so clearly established that Section 6002 extends immunity precisely as far as, and no farther than, the Fifth Amendment—this understanding of the Constitution is consistent with the language of the statute. The immunity described in Section 6002 is limited to "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)." That language is consistent with the government's use of the information provided by respondent. The information in question was neither "compelled under the order"—respondent and other individuals voluntarily recorded it at some earlier time—nor "directly or indirectly derived from" testimony or information compelled under the order. If it was derived from anything, it was derived from two unprotected actions: (i) the voluntary creation of the documents by respondent and others; and (ii) respondent's nontestimonial, physical act of production. On that point, it is illuminating that the district court felt it necessary to elide the crucial language of the statute in order to explain its view that this case fell within the statutory grant of immunity. *See* Pet. App. 130a (explaining that Section 6002 protects "information [gained through a grant of immunity]") (alteration by district court); *id.* at 131a (dismissing the indictment based on the finding that "the charges brought against [respondent were] directly or indirectly derived from the

documents [respondent] produced under subpoena") (emphasis added).

At bottom, all of the useful information that the government obtained from respondent's act of production is derived from the voluntary creation of the documents by respondent and others. The relevant exercise of respondent's mental faculties occurred at the time the documents were created, long before the subpoena was served. Because none of the information was "derived from" respondent's compelled communications, and because the privilege protects only information that is compelled, all of the information should be available for the government's investigation and prosecution of respondent.

II. A DEFENDANT'S PRODUCTION OF ORDINARY BUSINESS RECORDS IN SPECIFIED CATEGORIES DOES NOT IMPLICATE THE FIFTH AMENDMENT WHEN THE DEFENDANT'S POSSESSION OF RECORDS OF THE SPECIFIED CATEGORIES IS A FOREGONE CONCLUSION

The discussion in Point I proceeds on the assumption that the subpoena in this case in fact compelled a testimonial communication of sufficient substance to implicate the Fifth Amendment. In our view, however, that assumption is incorrect: Whatever testimonial communications may have been implicit in respondent's act of production, none were of sufficient significance to implicate the Fifth Amendment. Thus, the lower court's analysis of this second, more fact-specific issue is inconsistent with the analysis of the Court in *Fisher*, the only case in which the Court previously has analyzed the question. On this ground, as well, the court of appeals's error warrants reversal.

As we explain in Point I, *Fisher*'s analysis of the taint question discussed above was, strictly speaking, dictum.

The reason, of course, is that the Court concluded that the trivial testimonial communications compelled by enforcement of the subpoena in that case did not implicate the privilege against self-incrimination. *Fisher*—like this case—involved a standard subpoena seeking ordinary and customary business records. 425 U.S. at 394.[11] Compulsion of testimony by such a subpoena, the Court held, did not compel testimonial communications that implicated the privilege against self-incrimination. The Court reasoned:

> It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers * * * are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truth-telling" of the taxpayer to prove the existence of or his access to the documents. The existence and location of the documents are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons no constitutional rights are touched. The question is not of testimony but of surrender. 425 U.S. at 411 (internal quotation and citations omitted).

Because the subpoena in this case, like the subpoena in *Fisher*, called only for specified categories of ordinary

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[11] The *Fisher* subpoena sought "[a]ccountant's workpapers pertaining to Dr. E.J. Mason's books and records of 1969, 1970 and 1971," "[r]etained records of E.J. Mason's income tax returns for 1969, 1970 and 1971," and [r]etained copies of reports and other correspondence between [specified individuals] during 1969, 1970 and 1971," which were "analyses by the accountant of the taxpayers' income and expenses." 425 U.S. at 394. The subpoena in this case is in substance quite similar (albeit admittedly more verbose). J.A. 47-53.

business records, the decision in *Fisher* calls for the same conclusion here: The subpoena compelled respondent to make no communication that rises to the level of testimony within the protection of the Fifth Amendment. The court of appeals, however, strayed from that straightforward application of *Fisher*, concluding instead that the foregone-conclusion doctrine applies only when the government is "capable of demonstrating with reasonable particularity a prior awareness that the exhaustive litany of documents sought in the subpoena existed and were in [respondent]'s possession," Pet. App. 62a.

Nothing in *Fisher* suggests that the government must overcome so high a hurdle. Indeed, the Court's discussion in *Fisher* of handwriting exemplars strongly supports our understanding of the doctrine: A testimonial communication implicit in an act-of-production which admits something that normally is true and not inherently incriminating does not rise to the level of a testimonial communication protected by the Fifth Amendment.

In the key passage in *Fisher*, the Court explained: "When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident." *Fisher*, 425 U.S. at 411. Two things about that passage undermine the analysis of the court of appeals. First, it plainly extends the doctrine to generalities that are not necessarily true—there certainly are some people who cannot write, so the government necessarily obtains information by forcing a person to admit that he can. *See id.* (the compulsion in *Fisher* "adds *little* or nothing to the sum total of the Government's information") (emphasis added). Second, the passage suggests that a request for handwriting exemplars always would be

permissible, but not, as respondent would have it, because the government can make a defendant-specific factual showing of its advance knowledge of the defendant's compelled implicit testimonial admission of his ability to write. Rather, the *Fisher* Court suggests that compulsion is permissible because in the general run of cases it conveys nothing of significance to know that a defendant can write. The same reasoning governs this case, in which the compelled communication is an admission that respondent maintains several customary (and perfectly lawful) classes of business records.

The court of appeals nevertheless mischaracterized *Fisher* as a case in which the government "had highly specific knowledge as to the existence of the accountant's work papers as well as their location." Pet. App. 33a. But the Fisher Court's explanation of its decision does not mention any specific knowledge the government had about those papers; this is a remarkable situation if (as the court of appeals concluded) the decision turned on the government's possession of particularized knowledge of the subpoenaed documents. The error of the lower court's analysis is illuminated by its need to rely on the opinion of Justice Brennan (concurring only in the judgment) to support its view of the factual basis for the *Fisher* decision. *See* Pet. App. 37a (relying on government's knowledge of documents as reported in Justice Brennan's opinion, 425 U.S. at 430 n.9).

The court of appeals also erroneously suggested that its narrow reading of *Fisher* was justified by a retreat from *Fisher* in *Doe*. Pet. App. 34a-35a & 37a-39a n.24. The *Doe* opinion cannot bear the reading that the court of appeals attributes to it. The Court in *Doe* did briefly mention the lower court finding that the production there implicated the Fifth Amendment. The Court did not, how-

ever, affirmatively embrace that finding. Rather, it blandly noted that the finding "essentially rest[ed] on [the lower court's] determination of factual issues," 465 U.S. at 613-14, and then addressed the questions on which it had granted review. The Court's decision not to be diverted from those important questions by a review of the factual findings that those questions presupposed hardly suggests an intention to disavow or distinguish *Fisher*. *See* Pet. App. 105-a-106a (Williams, J., dissenting).

The dire consequences of the "reasonable particularity" standard adopted by the court of appeals cannot be overemphasized. That standard drains the "foregone conclusion" doctrine of all force just as surely as the automatic-taint rule criticized in Point I undermines *Fisher*'s rejection of *Boyd*. For all practical purposes, the identity of a document is determined by its contents. Only by its contents—what it says, not its shape, size, or texture—may a document be described with any particularity, for it is those contents that give the document significance. Thus, a standard requiring identification of a document with reasonable particularity is, in effect, a standard that demands advance knowledge of the contents of the documents.

In practice, the court of appeals has done in a more intricate way exactly what it criticized the district court for doing: Both decisions effectively require advance knowledge of the contents of a document as a predicate for lawful use of the document's contents. That is a daunting standard and, absent omniscience, one that few prosecutors are likely to meet. *Cf. United States v. R. Enterprises*, 498 U.S. 292, 297 (1991) (grand jury subpoenas need not be specific requests for relevant and admissible information; "the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists"). The court of appeals's standard would have precluded respondent's prosecution here. Moreover, in practical effect, it puts documents beyond the normal reach of a grand jury subpoena. Because the standard has no basis in the language of the Fifth Amendment or the opinions of this Court, and because it is inconsistent with the Court's treatment of virtually identical facts in *Fisher*, the decision of the court of appeals cannot be sustained.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the district court for implementation of the plea agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1999

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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49 AP

QUESTIONS PRESENTED

1. Did Mr. Hubbell have a valid Fifth Amendment privilege relieving him of the obligation to disclose to the government whether he had any of the potentially incriminating documents sought by the subpoena?

2. If Mr. Hubbell had such a valid privilege, could the government compel him to give it up in return for immunity and still use the incriminating documents to build a criminal case against him?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 11

ARGUMENT 16

I. THE FIFTH AMENDMENT PRIVILEGE: SUBPOENAS *DUCES TECUM* 18

A. The Fifth Amendment Privilege Applies Because Compliance with a Subpoena *Duces Tecum* Involves *Testimony* 18

B. To Be Privileged, the Testimony Involved in Complying with a Subpoena for an Incriminating Document Need Only Lead the Government to Obtain the Document 25

C. Subpoenas *Duces Tecum* Involve Core Fifth Amendment Issues, Not Just Tangential Ones 26

II. IMMUNITY BARS USE OF THE DOCUMENTS TO INCRIMINATE MR. HUBBELL 29

III. THE FOREGONE CONCLUSION EXCEPTION DOES NOT APPLY 35

CONCLUSION 42

TABLE OF AUTHORITIES

Page(s)

CASES

Andresen v. Maryland, 427 U.S. 463 (1976) 19

Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990) 32

Boyd v. United States, 116 U.S. 616 (1886) 19, 34

Braswell v. United States, 487 U.S. 99 (1988) 15, 32, 33

Counselman v. Hitchcock, 142 U.S. 547 (1892) 13, 25, 30

Doe v. United States, 487 U.S. 201 (1988) ("*Doe II*") 13, 22, 24, 25, 27

Fisher v. United States, 425 U.S. 391 (1976) ..... *passim*

Gilbert v. California, 388 U.S. 263 (1967) 18

In re Grand Jury Proceedings on Feb. 4, 1982, 759 F.2d 1418 (9th Cir. 1985) 40

In re Grand Jury Subpoena Duces Tecum Dated Nov. 13, 1984, 616 F. Supp. 1159 (E.D.N.Y.1985) 41

Page(s)

CASES (CONT'D)

In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992, 1 F.3d 87 (2d Cir. 1993) 40, 41

Holt v. United States, 218 U.S. 245 (1910) 18

Kastigar v. United States, 406 U.S. 441 (1972) ..... *passim*

In re Katz, 623 F.2d 122 (2d Cir. 1980) 40

Morrison v. Olson, 487 U.S. 654 (1988) 35

Murphy v. Waterfront Commission, 378 U.S. 52 (1964) 25, 27

Nix v. Williams, 467 U.S. 431 (1984) 32

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 18, 27

Schmerber v. California, 384 U.S. 757 (1966) 18, 24

In re Sealed Case, 791 F.2d 179 (D.C. Cir. 1986) 31

Shapiro v. United States, 335 U.S. 1 (1948) 32

In re Steinberg, 837 F.2d 527 (1st Cir. 1988) 34, 40

Ullman v. United States, 350 U.S. 422 (1956) 25

Page(s)

CASES (CONT'D)

United States v. Anello, 765 F.2d 253 (1st Cir. 1985) 40

United States v. Clark, 847 F.2d 1467 (10th Cir. 1988) 40

United States v. Doe, 465 U.S. 605 (1984) ("*Doe I*") ..... *passim*

United States v. Fisher, 500 F.2d 683 (3d Cir. 1974) 39

United States v. Fox, 721 F.2d 32 (2d Cir. 1983) 40

United States v. Lee, 699 F.2d 466 (9th Cir. 1982) 32

United States v. Neely, No. 94-5107, 1996 U.S. App. LEXIS 2106 (4th Cir. Feb. 13, 1996) 34

United States v. Praetorius, 622 F.2d 1054 (2d Cir. 1979) 40

United States v. Rue, 819 F.2d 1488 (8th Cir. 1987) 40

United States v. Schlansky, 709 F.2d 1079 (6th Cir. 1983) 40

United States v. Wade, 388 U.S. 218 (1967) 18

United States v. Walker, 982 F. Supp. 288 (S.D.N.Y. 1997) 41

CONSTITUTIONS AND STATUTES

18 U.S.C. § 6002 ..... 2, 14, 29

18 U.S.C. § 6003 5

U.S. Const. amend. V ..... *passim*

MISCELLANEOUS

Wayne R. LaFave, Jerold H. Israel, & Nancy J. King 3 *Criminal Procedure* 2d (1999) 40

Bernard P. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687 (1951) 27

William J. Stuntz, *Self-Incrimination and Excuse*, 88 Colum. L. Rev. 1227 (1988) 28

8 John H. Wigmore, *Evidence* (1961) 12, 21, 25, 35

3 John H. Wigmore, *Evidence* (1970) 32

S. Rep. No. 91-617 (1969) 17

Hearings on H.R. 11157 and H.R. 12041, 91st Cong. 31 (1969) 17

In the Supreme Court of the United States

OCTOBER TERM, 1999

No. 99-166

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This case involves an unprecedented use of the immunity power. At the very outset of its investigation, the Office of Independent Counsel ("OIC") served a subpoena on Mr. Hubbell for virtually all of his and his family's business, financial and tax documents. J.A. 46-53.[1] When Mr. Hubbell asserted his Fifth Amendment privilege in response, the OIC overrode the privilege with an order of statutory

[1] "J.A." references are to the separately bound joint appendix. "Pet. App." references are to the appendix to the petition for certiorari. "R." references are to the joint appendix filed in the court of appeals.

immunity under 18 U.S.C. § 6002. J.A. 60-61. And when, under protection of immunity, Mr. Hubbell truthfully disclosed to the Office of Independent Counsel each and every document in his possession called for by the subpoena, J.A. 62-70, the OIC used the documents to develop the case resulting in his indictment.

Because the OIC issued the subpoena at the outset of the investigation,[2] when it did not know what documents Mr. Hubbell had, it could make no claim in the district court that the existence and his possession of the documents were a "foregone conclusion." Consequently, the OIC had to concede on the record in the district court that Mr. Hubbell's Fifth Amendment privilege claim was valid. And because the OIC had conferred immunity at the very outset of its investigation, it was unable to show that the evidence supporting its case was obtained from legitimate independent sources. Instead, the OIC had to concede on the record that it had used the documents to bring the indictment.

We are not aware of any other case in which a prosecutor used the immunity power at the *outset* of its investigation to obtain evidence against the immunized witness himself.[3]

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2 R. 171; Appellees' Brief in the court of appeals ("App. Br.") at 5. We were prepared to prove that the OIC began its investigation by issuing the subpoena at the anticipated *Kastigar* hearing, the need for which was obviated by the OIC's concession that it used the documents to develop evidence against Mr. Hubbell. In any event, the OIC has never contested this.

3 Indeed, we are aware of less than a handful of reported cases in which the government has indicted a witness after he or she produced documents under immunity. *See infra* at page 34 n.37.

1. The Subpoena

The subpoena was issued in November 1996, while Mr. Hubbell was still serving a sentence on an earlier case brought against him by the Office of Independent Counsel. App. Br. at 3. The subpoena called for Mr. Hubbell to produce any of a wide variety of business or financial documents he might have, relating either to himself, his wife, or his children. J.A. 47-49. The subpoena covered the nearly four-year period since Mr. Hubbell had moved to Washington, D.C., and included the time in 1994 and 1995 during which Mr. Hubbell engaged in a sole proprietorship consulting business, entirely on his own. J.A. 46-53.[4]

The subpoena called for Mr. Hubbell to produce, among other things:

> 1. [A]ll documents reflecting, referring, or relating to any *direct* or *indirect sources of money* [including money from clients] to . . . Hubbell, his *wife*, or *children* from January 1, 1993, to the present;
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> 2. [A]*ll bank records* of Webster Hubbell, his wife, or children . . . from January 1, 1993, to the present;

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4 Mr. Hubbell was an attorney practicing at the Rose Law Firm in Little Rock, Arkansas up until the end of 1992, when he moved to Washington, D.C. *See* Pet. App. 42a; R. 174. From early 1993 until April 1994, Mr. Hubbell was an employee of the United States Department of Justice, serving for most of that time as Associate Attorney General. R. 174. In April 1994, Mr. Hubbell resigned from the Justice Department and engaged in a sole proprietorship consulting business entirely on his own. *Id.* In December 1994, he pleaded guilty to embezzling funds while he had been at the Rose Law Firm. R. 105. He began serving a 21-month prison term in August 1995. R. 175; App. Br. at 3.

3. [A]ll documents . . . relating to *time worked* or billed . . . or relating to expenses incurred . . . .;

4. [A]ny document that would disclose *Webster Hubbell's schedule of activities* from January 1, 1993, to the present;

5. [A]ll documents . . . relating to retainer agreements or contracts for employment;

6. [T]ax returns and tax return information, including form 1099s, schedules, draft returns, work papers, and back-up documents . . . for the tax years 1993 to the present.

J.A. 47-49.

The documents responsive to this subpoena disclosed, among other things, Mr. Hubbell's clients, some of the work he had done for them, and some of the fees received. App. Br. at 4. Some of these fees had been inadvertently omitted from Mr. Hubbell's 1994 tax return. *Id.* Mr. Hubbell, through counsel, informed the OIC that he would assert his Fifth Amendment privilege against self-incrimination in response to the subpoena, and would decline to state what, if any, responsive documents existed. *Id.*

The Office of Independent Counsel accepted the claim of privilege. *Id.* It did not argue that the existence of the documents or Mr. Hubbell's possession of them was a foregone conclusion. Had the matter ended there, the OIC would not have obtained any documents from Mr. Hubbell. However, the Office of Independent Counsel decided to override Mr. Hubbell's self-incrimination privilege with a grant of statutory immunity. *Id.* at 4.

2. The Immunity Order

The OIC obtained an order under 18 U.S.C. § 6003 compelling Mr. Hubbell to produce the documents under protection of immunity. *Id.* The Order, dated November 14, 1996, states, *inter alia*, that "in the judgment of the Office of Independent Counsel, the production of [the] documents by Webster L. Hubbell is necessary to the public interest." J.A. 60. The Order directed Mr. Hubbell to produce the documents and provided: "That Webster L. Hubbell is granted immunity to the extent allowed by law." J.A. 61.

On November 19, 1996, Mr. Hubbell appeared before the grand jury. J.A. 62-70. He asserted his Fifth Amendment privilege, and declined to state whether any responsive documents existed.[5] Immunity was then conferred, and he was directed to produce responsive documents. J.A. 63-64.

Mr. Hubbell produced 13,120 pages of financial and tax records and appointment calendars, including: documents identifying his clients in 1994 and 1995; documents showing what work he had performed for some clients; documents reflecting fees they paid; and documents showing the lower fee income reported on the 1994 tax return. Pet. App. 113a; R. 178. The documents also showed that the Hubbells had paid only part of their reported 1994 tax liability. App. Br. at

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[5] *See* J.A. 62 (Mr. Hubbell's testimony before the grand jury). Thus, when asked to produce documents responsive to the subpoena, Mr. Hubbell stated:

> Based on my Fifth Amendment privilege against self-incrimination and on advice of counsel, I decline to state *whether there are* documents, within my possession, custody or control responsive to the subpoena.

Id. (emphasis added).

5. Numerous other documents related to Mr. Hubbell's children, his wife, and family financial transactions.

The OIC then required Mr. Hubbell to make explicit the testimony which is often only implicit in a document subpoena context. It compelled Mr. Hubbell truthfully to state in the grand jury, in response to questions concerning *each* specification in the subpoena, whether he had produced *all* of the responsive documents in his custody or control. *See* J.A. 62-70. For example:

> Q. . . . Now paragraph A of the Subpoena Rider, I am going to summarize this, but it says "Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received, provided to you, your wife, or children from January 1st, 1993 to the present, including the identity of employees, clients, legal or other type work." Did you provide all those documents pursuant to this Subpoena?
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> A. Yes.

J.A. 65. Similar questions were asked and answers given for all eleven specifications in the subpoena. *Id.* at 65-70. And Mr. Hubbell was asked to state that he understood the concept of "constructive possession" and to affirm that he had produced all responsive documents in his constructive possession. *Id.* at 67.

3. The Indictment

Prior to the receipt of these documents the OIC knew little if anything about the Hubbells' 1993-96 financial affairs, his clients, his sources of money, or his taxes. Using these documents as the starting point, the OIC identified and subpoenaed Mr. Hubbell's clients, inquired into the work he

had done for them, and conducted a thorough investigation of Mr. Hubbell's and his family's financial and tax affairs.[6] Initially, the OIC was hoping to show that clients were paying fees to influence his testimony.[7] But, looking through the documents, the OIC investigated several other possible criminal theories, including whether Mr. Hubbell failed to report all of his income on his tax returns or failed to pay the tax due. Finally it brought this indictment charging Mr. Hubbell with underreporting his 1994 income; and charging Mr. Hubbell, his wife, and two tax professionals with evasion of the obligation to pay the taxes that had been reported. J.A. 9-44.

4. The Motion to Dismiss

Mr. Hubbell filed a pre-trial motion in the district court to dismiss the indictment on the ground that it had been built with evidence obtained by the OIC as a result of truthful and honest disclosures Mr. Hubbell had made under protection of immunity. R. 164. In response, the OIC affirmatively agreed that Mr. Hubbell had had a Fifth

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[6] In response to questions from the district court, counsel for the Office of Independent Counsel stated:

> [W]e *could* have gotten a Dun & Bradstreet on him. We *could* have found out what his bank records were. We *could* have gone and subpoenaed all the individual banks for their records. We *could* have gone to the papers that he filed with the IRS. We *could* have gone to the accountant. We *could* have gone to his credit card companies . . . . We could have gotten every one of these things.

J.A. 90. But the OIC also conceded that it had done none of these things prior to the subpoena, explaining "We do not have to do it in that order, Judge." *Id.*

[7] *See* J.A. 92. But that was not the case and no such charges were ever brought.

Amendment right not to produce the subpoenaed documents. The OIC said in its brief to the district court:

> *Doe* and *Fisher* make it clear that because of these three 'testimonial aspects of production' [existence, possession and authentication] an individual who receives a Federal grand jury subpoena that commands him to produce business records may assert his Fifth Amendment privilege against self-incrimination.[8]

The Office of Independent Counsel also wrote:

> For the purposes of this motion there is no factual dispute. Moreover, the legal dispute is limited. Both parties agree an individual can respond to a subpoena commanding business records by asserting his privilege against self-incrimination.[9]

The OIC also conceded—as it does here[10]—that it had used the documents whose existence Mr. Hubbell had disclosed under the immunity order to build the case resulting in the indictment. R. 300. It told the district court that it "would make no bones about the fact that [it] did use the information provided by Mr. Hubbell pursuant to the production immunity." R. 475.

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8 R. 303. The OIC conceded that it could not have obtained the documents by search warrant, because it lacked probable cause. J.A. 89.

9 *Id.* at 311-12.

10 *See* OIC Br. at 3. Because the OIC conceded this issue below, no *Kastigar* hearing was held, and the details of the OIC's use of the documents are not developed in the record.

The OIC's position in opposition to the motion to dismiss in the district court was that it could override Mr. Hubbell's concededly valid claim of privilege with a grant of immunity, and still use the documents to prosecute him. R. 300. The district judge rejected that argument as inconsistent with *Kastigar* and dismissed the indictment. Pet. App. 137a. The judge also addressed a question not directly raised by the OIC, and found that the OIC had not shown that the existence of the "documents or their contents was a 'foregone conclusion.'" Pet. App. 134a.[11]

5. The Appeal

On appeal, the OIC argued for the first time that Mr. Hubbell had no Fifth Amendment privilege, urging that the existence and possession of business records by *any* businessman is a foregone conclusion.[12] Second, the OIC argued, as it had in the district court, that it could displace the Fifth Amendment privilege with an immunity order, and still use the documents against the immunized witness.

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11 The OIC never asserted in the district court that existence and possession of the subpoenaed records were a "foregone conclusion." Indeed, as already noted, the OIC expressly conceded that Mr. Hubbell had a valid Fifth Amendment right not to produce the documents. However, the district court inquired briefly into the OIC's knowledge of Mr. Hubbell's records at oral argument of the motion to dismiss. The attorney for the Office of Independent Counsel said that the OIC "could have gotten a Dun & Bradstreet on Mr. Hubbell, subpoenaed the individual banks . . . gone to the papers he filed with the IRS . . . the accountant . . . [and] his credit card companies." J.A. 90. But they had not done this, and the district court found "the assertion of counsel does not begin to show that the Independent Counsel's knowledge of the documents or their contents is a 'foregone conclusion.'" Pet. App. 134a.

12 OIC's Brief in the court of appeals at 25, 34, 39-40.

The panel addressed both issues. First, following this Court's decisions in *Fisher* and *Doe I*, the panel noted that the Fifth Amendment applies to document subpoenas because compliance may involve "testimony" as to existence, possession, or authenticity of the documents produced. Pet. App. 31a-32a. The Court held further, also relying on *Fisher* and *Doe I*, that where existence and possession are a foregone conclusion, insufficient testimony is involved, because the government is not relying on the witness' "truthtelling" to secure the evidence it seeks. Pet. App. 34a. The court then reviewed the court of appeals decisions applying the "foregone conclusion" exception, and concluded that in order to fall within the scope of that exception, the government must show that it knew with "reasonable particularity" of the existence of the subpoenaed documents and the defendant's possession of them before issuing the subpoena. Pet. App. 39a-42a, 52a-58a, 62a.

The court then rejected the OIC's position that — even where the Fifth Amendment privilege does apply — the government may override that privilege with a grant of statutory immunity and still use the documents to prosecute the witness. According to the court, *Kastigar v. United States*, 406 U.S. 441 (1972), ruled that result out, holding as it does that a statutory immunity order must leave "'the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.'" Pet. App. 65a (quoting from *Kastigar*, 406 U.S. at 462).

The court then remanded the case to permit the OIC to develop the record regarding its prior knowledge of Mr. Hubbell's records, and for the district court to apply the "reasonable particularity" standard to the facts developed in that record. Pet. App. 72a.

The full court of appeals denied rehearing *en banc*: four of the eleven judges in active service voted to rehear the case, five voted against and two recused themselves. *Id.* at 142a-143a.

Thereafter, Mr. Hubbell agreed to plead to a misdemeanor covering some part of the conduct alleged in the indictment. J.A. 104-14. He received an agreed upon sentence of no prison and no fine; and the charges against his wife and the two tax professionals were dropped. *Id.* at 106-09. Under the plea agreement the misdemeanor plea will be set aside and the charge dismissed against Mr. Hubbell unless this Court reverses the decision below in a manner that would have made the case prosecutable. *Id.* at 106-07.[13]

The Office of Independent Counsel then filed a petition for a writ of certiorari with this Court. The petition was granted.

SUMMARY OF THE ARGUMENT

The immunity statute was never designed to be used as a means for obtaining evidence against the person who is immunized. The statute was designed to permit a prosecutor to compel evidence from the immunized witness to be used against *others*, ideally with a minimum of damage to the prosecution's case against the immunized witness.[14] This

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[13] In light of the plea, no further record will ever be developed on the issue of the OIC's prior knowledge of Mr. Hubbell's records. The OIC made no effort to satisfy the foregone conclusion test the first time the case was in the district court. And, the OIC has conceded its inability to meet the "reasonable particularity" standard described in the Court of Appeals opinion. OIC Br. at 7.

[14] *See infra* at 17 n.15.

Court in *Kastigar v. United States*, 406 U.S. 441 (1972), emphatically held that the prosecution cannot use the immunity statute as a way of improving its case against the immunized witness.

The OIC's position, if accepted, would permit prosecutors all over the country to compel testimony under immunity as a way of obtaining evidence against the immunized witness. It is appropriate to view this position, then, with a reasonable degree of skepticism. And as it turns out, the position is impossible to square with basic principles of Fifth Amendment and immunity jurisprudence.

1. The Fifth Amendment Privilege: the Importance of Testimony

The Fifth Amendment privilege applies to document subpoenas because compliance will usually involve *testimony*. This Court's decisions in *Fisher v. United States*, 425 U.S. 391, 410 (1976), and *United States v. Doe*, 465 U.S. 605, 617 (1984) ("*Doe I*"), explain that responding to a document subpoena involves testimony because "compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control" by the witness.

As Wigmore put it, a subpoena *duces tecum* constitutes "process relying on the [witness'] moral responsibility for truthtelling." 8 John H. Wigmore, *Evidence* § 2264, at 379 (1961). Every witness receiving a subpoena *duces tecum* is being asked to tell the government what documents (or things) he has that are responsive. If the witness produces nothing in response, he is representing that he has nothing responsive. If he produces one piece of paper, he is representing that it is responsive, and that he has nothing else responsive. These representations are ordinarily made by *conduct*, and not in words, but they are nonetheless

testimonial under *Fisher* and *Doe I*. These representations are important because the government will generally only receive the incriminating documents it seeks if the witness' representations in response to the subpoena are truthful, *i.e.*, if he truthfully and honestly discloses the responsive documents that he has.

To be privileged, this testimony need do no more than tell the government what incriminating documents the witness has. It has been settled and oft-repeated Fifth Amendment law for over a century that a person may not be compelled to make disclosures which—though innocuous in themselves—would *lead* the government to obtain other evidence which would incriminate. *E.g.*, *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892); *Doe v. United States*, 487 U.S. 201, 208 n.6 (1988) ("*Doe II*").

The government's briefs struggle to discern some more complex testimonial aspect to the act of producing documents. But the Fifth Amendment applies for a simple and straightforward reason. The act of producing the documents tells the government what documents exist. And the government will not obtain incriminating evidence to use against the witness if the witness responds untruthfully and fails to produce responsive documents. It is only the witness' truthful testimony, admitting to the documents he has, that will lead the government to obtain the incriminating evidence.

Thus, subject to the foregone conclusion exception, discussed *infra*, a witness who receives a subpoena for potentially incriminating documents may assert his Fifth Amendment privilege in response, and may decline to inform the prosecution what responsive documents, if any, exist and are in his possession. That is the teaching of *Fisher* and *Doe I*. The Office of Independent Counsel was right to concede this expressly in the district court.

2. The Effect of Immunity in the Context of a Document Subpoena

If a witness has a valid Fifth Amendment privilege, and is compelled to disclose the existence of incriminating evidence to the government under *immunity*, the prosecution cannot use that evidence to build a case against the witness. The evidence is *derived from* the compelled testimony, because the government only receives the evidence if the witness responds truthfully to the subpoena.

The immunity statute and this Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), are emphatic on this point. The statute prohibits the prosecution not only from using testimony compelled under immunity. It also forbids use of "any *information directly or indirectly derived from* such testimony." 18 U.S.C. § 6002 (emphasis added). This Court upheld the statute against constitutional challenge in *Kastigar* precisely because the statute prevents prosecutors from using "evidence derived from" the compelled testimony. 406 U.S. at 442. This Court recognized that the privilege protects "disclosures that the witness reasonably believes could be used in a criminal prosecution or could *lead* to other evidence that might be so used," *id.* at 445 (emphasis added). The witness is accordingly guaranteed that immunity will "leave[] the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege," and the privilege had been honored. *Id.* at 462.

It is fruitless to argue, as the Office of Independent Counsel and the Department of Justice do, that the documents whose existence Mr. Hubbell disclosed under immunity may be treated as though they had come to the government like "manna from heaven." OIC Br. at 7; DOJ Br. at 25. They did not come to the government like "manna from heaven." Instead, the OIC obtained the potentially

incriminating documents because it compelled Mr. Hubbell *under immunity* to tell it of every single document he had which was responsive to the subpoena. The OIC obtained the documents only because, *under immunity*, Mr. Hubbell responded truthfully. The evidence was obtained through compelled immunized testimony and it is hopelessly tainted.

This Court made it ringingly clear that *immunized document productions* will have serious taint implications. In *Braswell v. United States*, 487 U.S. 99 (1988), this Court said:

> if the Government has any thought of prosecuting the custodian, a grant of act of production immunity can have *serious consequences*. Testimony obtained pursuant to a grant of statutory use immunity may be used neither *directly nor derivatively* [citing *Kastigar*].

Id. at 117 (emphasis added).

The OIC proceeded heedless of these warnings. Instead of balancing the need for obtaining evidence against someone *else*, on the one hand, against the risks to any prosecution of Mr. Hubbell, on the other, the OIC used the immunity power to get evidence from Mr. Hubbell *to use in prosecuting him*.

Simply put, because Mr. Hubbell was truthful in telling the grand jury *under immunity* what documents he had, he got himself indicted. This cannot be squared with this Court's decisions on immunity or the Fifth Amendment.

3. Foregone Conclusion

Both the OIC and the Department of Justice offer the position at the end of their briefs that the existence and

possession of business and financial records are always a foregone conclusion, and therefore that Mr. Hubbell never had a valid Fifth Amendment claim in the first place.

We submit that this position should be rejected. First, the position was vigorously waived below by the OIC. Second, the position is identical to one taken unsuccessfully by the Department of Justice in *Doe I*. And third, the position is inconsistent with *Fisher* and *Doe I* because, if accepted, it would frequently permit the compelled production of documents even though the government was relying heavily on the truthtelling of the witness to obtain the documents.

Prosecutors have often been able to meet the "reasonable particularity" standard adopted by the Second Circuit and endorsed by the court below. There is no reason to disturb it—particularly not in this case.

ARGUMENT

The Office of Independent Counsel began its investigation of Mr. Hubbell by compelling him to disclose under statutory immunity what documents he had that were responsive to the very broad subpoena. When he did so truthfully, it then used those documents to build a criminal case against him. No prosecutor has ever done this before. And if this Court were to endorse what was done in this case, any prosecutor in the country could pick out a subject, compel the subject truthfully and honestly to disclose all of his personal and business documents, financial and tax, whether potentially incriminating or not, and then pore through those documents to see if some crime or another is suggested in them.

The immunity statute was never designed as a way for a prosecutor to obtain evidence against the immunized witness. The immunity statute was designed to permit a prosecutor to obtain evidence from the immunized witness to be used against *others*.[15] If a person's Fifth Amendment privilege places evidence beyond a prosecutor's reach, this Court's decision in *Kastigar* makes it absolutely clear that the prosecutor may not use the immunity statute to obtain that evidence from the person and use it against him.

Here, the OIC conceded that Mr. Hubbell had a valid Fifth Amendment right not to disclose what documents he had. As we show below, this was a concession compelled by this Court's document subpoena decisions. The OIC then used the *immunity statute* to obtain the documents and used the documents to build a criminal case against Mr. Hubbell.

This cannot be done consistent with settled principles of Fifth Amendment and immunity jurisprudence. The Fifth Amendment applies because compliance with a document subpoena involves "testimony": a subpoenaed witness must tell the government what documents he has that are responsive. The government only gets the incriminating evidence it seeks if the witness' "testimony" is truthful: it is the truthful disclosure by the witness of the existence of each of the responsive documents that leads the government to obtain the documents. Consequently, if the witness is

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15 *See* S. Rep. No. 91-617 (1969), at 55; *Hearings on H.R. 11157 and H.R. 12041 to Amend Title 18, United States Code, to Prescribe the Manner in Which a Witness in a Federal Proceeding May Be Ordered to Provide Information After Asserting His Privilege Against Self-Incrimination and to Define the Scope of the Immunity to Be Provided Such Witness with Respect to Information Provided Under an Order*, 91st Cong. 31 (1969) (statement of Mr. Poff) (discussing similarly worded predecessor bill).

compelled to testify, *under immunity*, to what documents he has, the documents are tainted.

I. THE FIFTH AMENDMENT PRIVILEGE: SUBPOENAS *DUCES TECUM*

A. The Fifth Amendment Privilege Applies Because Compliance with a Subpoena *Duces Tecum* Involves *Testimony*

The Fifth Amendment to the United States Constitution provides in part "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This language does not prohibit all forms of compulsion on an accused. This Court has long held that it applies only to compelled "testimony," *i.e.*, direct or implicit assertions involving the obligation to tell the truth. *E.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 597 (1990) (any compelled "assertion of fact" forcing a choice between "truth, falsity or silence" "contains a testimonial component").[16] The critical issue therefore is what "testimony" is compelled from a person who must respond to a grand jury subpoena for potentially incriminating documents or other physical evidence.

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16 Thus, the privilege does not apply to an order compelling the accused to give blood samples, *Schmerber v. California*, 384 U.S. 757, 763-64 (1966), handwriting exemplars, *Gilbert v. California*, 388 U.S. 263, 265-67 (1967), voice exemplars, *United States v. Wade*, 388 U.S. 218, 222-23 (1967), or to don a blouse, *Holt v. United States*, 218 U.S. 245 (1910), because none of these orders depends for its effectiveness on the accused's truthtelling.

This Court addressed this issue directly in *Fisher*, 425 U.S. at 409.[17] In *Fisher*, the lower courts and the parties had focused on issues of authorship of the documents and personal privacy suggested in *Boyd v. United States*, 116 U.S. 616 (1886). Addressing those issues, the Court in *Fisher* first held that the fact that a document responsive to the subpoena had the subject's writing on it was essentially irrelevant to the analysis. The Court pointed out that the document had been created voluntarily, and that a document subpoena does not call on the subject "to restate, repeat, or affirm the truth of the contents of the documents sought." 425 U.S. at 409. The Court stated, therefore, that:

> The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

Id. at 410.

In so ruling, this Court laid to rest suggestions in *Boyd* and subsequent cases that the Fifth Amendment might protect an accused's private papers even if obtained without compulsion on the accused. The Court in *Fisher* held dispositively that *contents* of voluntarily created documents are not privileged. This ruling in *Fisher*, repeated in *Doe I*, 465 U.S. at 610-11, is a *significant* part of our Fifth Amendment jurisprudence. It means that a search warrant for a person's private papers does not implicate the Fifth Amendment, *see Andresen v. Maryland*, 427 U.S. 463 (1976); it means that a subpoena to a third party for the

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17 The Court stated at page 409 of the *Fisher* opinion: "we turn to the question of what, if any, incriminating *testimony* within the Fifth Amendment's protection, is compelled by a document summons." (emphasis added).

subject's private papers does not implicate the subject's Fifth Amendment privilege, *Fisher*, 425 U.S. at 398-99; and it means that a subpoena addressed to the subject himself does not implicate Fifth Amendment rights when existence and possession of those documents are a foregone conclusion. *Id.* at 411.[18]

The *Fisher* Court went on to state, however, that the act of producing evidence *does* in many cases involve testimony. Thus, the Court states:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer.[19]

In *Fisher*, the existence and location of the documents were undisputed,[20] and thus, under the facts of that case, compliance was held not to involve testimony as to existence or possession. *Id.* at 411. In *Doe I*, 465 U.S. at 614 n.13,

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18 The proposition that the *contents* of pre-existing documents are not privileged places a subpoena for documents on exactly the same footing as a subpoena for any other type of physical evidence. *Fisher* makes this point expressly, saying: "In the case of a document subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when *a chattel* or document not authored by the producer is demanded." 425 U.S. at 410 n.11 (emphasis added).

19 *Id.* at 410. The Court also ruled that compliance may tacitly authenticate the documents. *Id.* at 410-11.

20 We discuss the foregone conclusion exception at greater length at pp. 35-41 *infra*.

however, the Court pointed out that "[r]espondent did not concede" existence or possession, and ruled that the act of producing documents in response to the subpoena was "privileged" and that it "cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003." *Id.* at 617.

Thus, under the reasoning of *Fisher* and the holding of *Doe I*, compliance with a subpoena for documents, or other physical evidence, will compel the witness to give "testimony," unless the existence and his possession of the thing demanded are a foregone conclusion, because compliance requires the witness to tell whether he has the thing demanded (*i.e.*, whether it exists and is in his possession). This "testimony" is important in the document subpoena context, because the government will only receive the incriminating things demanded if the witness "testifies" truthfully about what he has.

As Wigmore put it,[21] the Fifth Amendment applies to a subpoena *duces tecum* because it constitutes "process relying on the witness' moral responsibility for truthtelling." 8 John H. Wigmore, *Evidence*, § 2264, at 379 (1961). A witness receiving a subpoena for an incriminating document or other item of physical evidence is required by law to tell the government whether he has it. Normally, the witness does this implicitly, by conduct. Thus, a witness bringing nothing in response to a subpoena is implicitly representing that he has nothing responsive to the subpoena; and one bringing a single document in response is implicitly representing that the document he brings is responsive to the subpoena, and that he has nothing else responsive to the subpoena. Sometimes, as in this case, the witness is asked

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21 Wigmore was cited and relied on by this Court in *Fisher*. 425 U.S. at 411.

to make an express representation that what he produced is everything he has that is responsive.[22] However, in either event, the witness is making such a representation. And the prosecutor's ability to receive the incriminating evidence demanded in the subpoena is dependent on the witness' representation being truthful and honest.

Under this Court's decisions, responding to a subpoena calling for a document of a particular description is no different from responding to an oral question inquiring about the existence and location of a document of that same description. Responding to the subpoena and responding to the oral question both involve "testimony"; and a truthful response will, in either case, lead the government to obtain the document. One situation involves testimony by conduct, and the other involves testimony in words. But the Fifth Amendment privilege does not distinguish between the two. Thus, this Court said in *Doe II* "[p]etitioner has articulated no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements." 487 U.S. at 210 n.8.

Consider a case in which the government compels a witness under immunity to admit through oral testimony that an incriminating document exists and to disclose its whereabouts. Assume that the government then goes and gets the document. We believe all would agree that the witness has given "testimony" and that the document is evidence derived from that testimony.[23] How then, is it

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22 *See* J.A. 62-70 (lengthy questioning of Mr. Hubbell in the grand jury).

23 It would be interesting to know if the government would agree. We note, of course, that the contents of the document, in this example, would not be "privileged." But the document would be tainted, and could not be used.

different if the government served a subpoena on the witness for the document, similarly requiring the witness to tell if the document exists, and if it does, requiring the witness to bring the document in himself? In each case, the witness had two choices: to respond truthfully and risk losing his liberty, or to respond untruthfully and go free. This is the Fifth Amendment dilemma. Under the Fifth Amendment we do not compel a truthful response, and we do not permit a dishonest one. We extend the privilege of silence.

The OIC and especially the Department of Justice strain to picture the *act* of producing documents as being purely a physical act not involving testimony. The Department of Justice says that so long as the documents were voluntarily created, "transfer of possession does not, *in and of itself*, involve any form of compelled testimony."[24] But this statement is contrary to this Court's decisions in *Fisher* and *Doe I*. Under those cases, it is through the act of producing, or not producing, a document — *and only through that act* — that a witness tells the government that he has or does not have the document. And in *Fisher* and *Doe I*, this Court made clear that the act of transferring possession, *in and of itself*, often does involve "testimony." Thus, in *Fisher*, the Court said, "[I]n the case of a documentary subpoena *the only thing compelled* is the *act of producing* the document . . . ." *Id.* at 410 n.11 (emphasis added). The Court held "the act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own . . . . [It] concedes the existence of the papers demanded and their possession or control by the taxpayer." *Id.* at 410. Similarly, in *Doe I*, the Court confirmed that a government subpoena "compels the holder of the document to perform *an act* that may have testimonial

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24 DOJ Br. at 12 (emphasis added). The Department reiterates later in its brief that, "[s]urrender of pre-existing physical evidence is not in and of itself a testimonial act . . . ." *Id.* at 26.

aspects," and then held "[t]he *act* of producing the documents at issue in this case is privileged . . . ." 465 U.S. at 612, 617 (emphasis added).[25]

Under this Court's decisions the *act* of producing documents in response to a subpoena, is in and of itself, testimonial, in many cases. Only when the existence and possession of the thing demanded are a foregone conclusion does the *act* lose its testimonial component. Otherwise, the *act*, in and of itself, is the way in which the witness tells the government what responsive documents he has.[26]

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25 The OIC compounds its misreading of *Fisher* and *Doe I*, saying:

> The government obtains that information directly from the physical act of production — an act that the Fifth Amendment does not protect — and it is in no sense derived from respondent's compelled testimony.

OIC Br. at 12. But *Fisher* and *Doe I* make clear that the Fifth Amendment *does* protect the *act* of production.

26 The *Schmerber* case upon which the OIC relies, 384 U.S. 757, is different on this critical element of testimony. *Schmerber* involves taking a blood sample from an accused. In the case of a blood sample, the government's ability to obtain the evidence it seeks is in no way dependent on the truthtellling of the accused. No testimony is involved. In the case of a subpoena *duces tecum*, the government *is* dependent on the witness' truthtelling. If the witness falsely denies possession of any responsive documents, the government gets nothing. *See generally* discussion of non-testimonial compulsion cases in *Fisher*, 425 U.S. at 405-09; and *Doe II*, 487 U.S. at 211 n.10 (explaining distinction between "being compelled himself to *serve as* evidence and . . . being compelled to *disclose or communicate* information or facts that might serve as or lead to incriminating evidence") (emphasis added).

B. To Be Privileged, the Testimony Involved in Complying with a Subpoena for an Incriminating Document Need Only Lead the Government to Obtain the Document

To be privileged, the "testimony" need do no more than lead the government to obtain the evidence. This Court's decisions hold that testimony that is innocuous in itself is nonetheless privileged if it will lead the government to other evidence that will incriminate. In *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892), this Court held that a person is privileged not to "disclose . . . the sources from which" incriminating "evidence . . . may be obtained."[27] This bedrock proposition of Fifth Amendment law was repeated and reaffirmed by this Court in *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); and *Kastigar*, 406 U.S. at 454. More recently, in *Doe II*, 487 U.S. at 208 n.6, the Court stated simply "the 'compelled testimony' need not itself be incriminating if it would lead to the discovery of incriminating evidence."[28]

Nothing more is required for the privilege to apply: only that the testimony will lead the government to obtain other incriminating evidence. Since the government will only obtain the incriminating documents in response to a

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27 It was from this fundamental tenet of Fifth Amendment law that the Court reasoned an immunity statute had to protect not only against direct use of compelled testimony, but also against "that use of compelled testimony which consists in gaining therefrom . . . sources of information which may supply other means of convicting the witness . . . ." *Id.* at 586.

28 *See also* Wigmore, *supra*, § 2260, at 371-76; *Ullman v. United States*, 350 U.S. 422, 437 (1956).

subpoena *duces tecum* if the witness truthfully discloses the documents that he has, those documents are clearly evidence *derived from* the testimony.

The OIC and the Justice Department argue that the only important testimony involved in subpoena compliance is testimony that tells the government something *about* the document—something the government could not learn by reading it.[29] But it was testimony of the documents' *existence* on which *Fisher* focused first. And, as just noted, the Fifth Amendment applies to testimony that leads the government to evidence, even if the testimony does not explain that evidence in any way.

C. Subpoenas *Duces Tecum* Involve Core Fifth Amendment Issues, Not Just Tangential Ones

Compliance with subpoenas *duces tecum* raise core Fifth Amendment issues, not just tangential ones. Asking a subject to disclose whether an incriminating item of physical evidence exists and is in his possession will frequently put that subject to the same choice as asking him whether he committed the crime. The choices in each case will be: tell the truth and lose your liberty, or falsify and go free. Under the Fifth Amendment's privilege against self-incrimination, we relieve people from this choice and permit them the option of silence.

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29 *See* DOJ Br. at 17 ("the producer's implicit representation that a particular document falls within the scope of the subpoena . . . may assist the government or the trier of fact in interpreting a document that is ambiguous"). The OIC insists that the privilege should apply only in cases in which the witness' production of the documents might be used to prove the witness's knowledge of their contents. OIC Br. at 21-22.

At its core, the Fifth Amendment relieves a person of his obligation to tell the truth when the truth will result in loss of liberty or life. — The Fifth Amendment does not permit a person to lie. It simply permits the person to be silent. — But it relieves him of the choice between telling the truth and going to jail on the one hand, and committing the crime of falsification on the other. That is the irreducible minimum thing that the Fifth Amendment *does*. In this country, we do not "subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Commission,* 378 U.S. at 55; *Doe II,* 487 U.S. at 212; *Pennsylvania v. Muniz*, 496 U.S. at 597.[30]

This core protection can be brought into play as starkly in a document subpoena context as in an oral interrogation context. Consider a subpoena to a murder suspect for any letters from the victim in his possession. Assume that that there is a circumstantial case against the suspect but no evidence connecting the suspect and the victim. Assume further that the letters are under the suspect's control and disclose a motive for the crime. A subpoena compelling him to state whether he has the letters, and requiring him to produce them, could force him to choose between truthfully admitting possession and certain incarceration or execution, on the one hand, or falsely denying possession and escaping on the other. This is the prototypical Fifth Amendment choice, presented as starkly as though he had been asked simply if he had committed the

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30 *See* Bernard P. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 692, 701 (1951) (explaining the difficulty of the choice on the ground that ". . . the law of self-preservation commands perjury or disobedience." "[The Fifth Amendment] is a reflection of the law's unwillingness to command the impossible, of its respect for the law of self preservation. . . ." "The application of the privilege to documents may reflect the same unwillingness to command the impossible, which is the most intelligible basis for the application of the privilege . . . .").

murder. The Fifth Amendment would free him from this choice.[31]

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31 As one commentator put it, the Fifth Amendment applies in full force to compelled production of an incriminating document *if the government does not already know of its existence*:

> [T]here, the suspect's choice is much the same as the choice he faces when questioned directly. In Part II, I argued that there are two very different categories of documents — those that the government can obtain only by subpoena because probable cause is absent [and it cannot be obtained by search warrant], and those the government can obtain with or without the defendant's cooperation. Start with the first category, and imagine a case in which police have only a bare suspicion that the incriminating document exists and is in the suspect's possession. Here, a subpoena for the document puts the suspect in precisely the same position as would an incriminating question on the witness stand. The only honest response would be to turn over the document, but that would add substantially to the government's case against the suspect. This gives rise to a strong incentive to be overtly dishonest since passivity is no longer an option.
>
> Not surprisingly, the Fifth Amendment protects the suspect in these circumstances, even after *Fisher* and *Doe*. By producing a document, the suspect implicitly testifies to its existence and authenticity and his own possession of it. Where those matters are at issue, *Fisher* and *Doe* establish that the government cannot compel production without an appropriate grant of immunity. In the example just discussed, the existence of the incriminating document is not a "foregoing conclusion"; consequently, the document need not be produced. In addition, while the government may immunize the act of production and thereby compel the suspect to turn the document over, the grant of immunity must as a practical matter cover the document's *contents*, since only in that way can the government ensure that it gains nothing from the disclosure of the document's existence.

William J. Stuntz, *Self-Incrimination and Excuse*, 88 Colum. L. Rev. 1227, 1278 (1988) (footnotes omitted).

Mr. Hubbell, too, was privileged not to tell the OIC whether he had in his possession records, which, among other things, reflected more income than was on his tax return. The Fifth Amendment relieved him of the choice between honestly responding to the subpoena, on the one hand, and withholding the incriminating documents on the other. The Fifth Amendment relieved him of this choice by permitting him not to produce the documents.

II. IMMUNITY BARS USE OF THE DOCUMENTS TO INCRIMINATE MR. HUBBELL

The Office of Independent Counsel's position on immunity is equally inconsistent with this Court's decisions. Its fundamental position is that it can force Mr. Hubbell honestly to respond to the subpoena, and then use his honest responses to prosecute him a second time and send him back to jail. This position is hopelessly at odds with the immunity statute and this Court's cases interpreting it.

The immunity statute states in the clearest possible terms that it forbids use not only of the compelled testimony (here the act of production), but any information *derived* from the compelled testimony. The statute commands:

> [N]o testimony or other information compelled under the order (*or any information directly or indirectly derived from such testimony or other information*) may be used against the witness in any criminal case . . . .

18 U.S.C. § 6002 (emphasis added). The statute's protection of evidence derived from the compelled testimony was

critical to its constitutionality. This Court made this plain in *Kastigar*.

In upholding the statute against a challenge that it did not adequately supplant the privilege, the Court in *Kastigar* emphasized that the immunity statute prevents prosecutors not only from using the compelled testimony, but also from using "evidence derived from" the testimony. 406 U.S. at 442. The compelled testimony cannot lead to "other evidence" to be used against the witness, *id.* at 445; indeed, it cannot be used "in *any* respect." *Id.* at 453. The point, according to *Kastigar*, is that the testimony "can in no way lead to the infliction of criminal penalties" on the witness. *Id.* at 461. The witness is guaranteed that immunity will "leave[] the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege," and the privilege had been honored. *Id.* at 462. Because the statute confers protection as broad as the privilege it displaces, its constitutionality was sustained.[32]

The briefs of the OIC and the Department of Justice ignore *Kastigar* and its obvious implications for this case. The OIC reverts to the unexceptionable proposition that the *contents* of the documents (*i.e.*, the words written on them) are not compelled, and consequently that the contents are not "privileged." But this does not take the OIC very far.

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[32] Congress once enacted an immunity statute that only protected the privileged testimony itself—providing for use immunity but not derivative use immunity. But this Court struck that statute down as unconstitutional. *Counselman v. Hitchcock*, 142 U.S. at 585. The OIC's position that only the compelled act of production should be protected, but not the documents it obtained as a result, is an effort to rewrite the current "use and *derivative* use" immunity statute and make it a "use only" statute like the one held unconstitutional in *Counselman*.

As Mr. Justice Scalia, while a Judge in the D.C. Circuit Court of Appeals, stated in response to a contention that because the *contents* of documents compelled under immunity are "unprivileged" they can be used against the immunized witness:

> The flaw in this reasoning is that the fact that the contents of the tapes are *unprivileged* does not mean that they will necessarily remain *untainted*. If the government prosecutes [the witness] in the future it will have to meet the "heavy burden," *Kastigar* 406 U.S. at 461, of proving that all evidence it seeks to introduce is untainted by the immunized act of production.

In re Sealed Case, 791 F.2d 179, 182 (D.C. Cir.), *cert. denied*, 479 U.S. 924 (1986).

The point is a simple one. Under the current immunity statute and *Kastigar*, protection is given to more than just the "privileged" testimony itself. Protection is given, as it must be, to other evidence (including physical evidence) which is not "privileged," but to which the government is led by the testimony.[33]

Thus, if a witness were compelled to give testimony under immunity (or a confession were coerced) disclosing the

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[33] The Department of Justice argues that this Court rejected this proposition in *Doe I*. DOJ Br. at 19 (citing *Doe I*, 465 U.S. at 617 n.17). But the Court there was careful to specify that a grant of immunity in connection with a document subpoena must protect the witness "from the self-incrimination *that might accompany* the act of producing" documents. *Id.* (emphasis added). Our position is that where the "testimony" compelled by the act of production is that the responsive documents exist, the documents are tainted.

whereabouts of a body, a murder weapon, or an incriminating document, the prosecution would be forbidden from using these items of evidence against the accused, unless it could prove that it was led to them by a legitimate independent source.[34] This is true not because these items are "privileged"; they are not. It is true because they are *tainted* by compelled testimony. [35]

Any doubt that *Kastigar*'s principles apply in full force to the immunized production of documents was laid to rest by this court in *Braswell v. United States*, 487 U.S. 99 (1988). The Court in *Braswell* reiterated that the contents of subpoenaed documents are unprivileged. And then the Court, echoing Justice Scalia's point in *In re Sealed Case*, suggested that documents produced under immunity could nonetheless be tainted:

> [A] grant of production immunity can have *serious consequences*. Testimony obtained pursuant to a grant of statutory use immunity may be used neither *directly nor derivatively* [citing *Kastigar*]. "[O]ne raising a claim under the statute need only

34 *E.g.*, *Nix v. Williams*, 467 U.S. 431 (1984) (body); *United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982) (murder weapon); 3 Wigmore, *Evidence*, "Fruits of Poisonous Tree" § 859, at 557 n.7 (1970), and cases there cited (other physical evidence).

35 The OIC and the Department of Justice rely on this Court's decision in *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990). In *Bouknight*, the issue was whether a mother, who had been granted custody of her son by the Department of Social Services, had a Fifth Amendment privilege to refuse to produce her child to the Department of Social Services on request. *Bouknight* did not involve immunity at all. It held that the Fifth Amendment did not apply to an order requiring a custodian to produce a child to the state protective services agency, relying on the "required records" exception to the Fifth Amendment. *See Shapiro v. United States*, 335 U.S. 1, 17-18 (1948).

> show that he testified under a grant of immunity in order to shift to the government the *heavy burden* of proving that all the evidence it proposes to use was derived from legitimate independent sources."

Id. at 117 (emphasis added) (quoting from *Kastigar*).[36]

These principles, expounded by *Kastigar* and confirmed by *Braswell*, are dispositive of this case. Use by the Office of Independent Counsel against Mr. Hubbell of documents whose very existence it compelled him to disclose under immunity, would violate *Kastigar*'s clear command that Mr. Hubbell is entitled to be left in the same position vis-à-vis criminal prosecution that he would have been in had he simply been allowed to assert his privilege.

The OIC, in effect, compelled Mr. Hubbell to tell it what incriminating documents he had. It compelled him to do this under immunity. And because he told the OIC truthfully what he had, and *only* because he did so, the OIC obtained the incriminating documents. It then concededly "used the information contained in those documents . . . to develop the various tax-related charges alleged in the indictment." OIC Br. at 3. This cannot be squared with the applicable law on immunity.

As this Court said in *Braswell*, immunity has "serious consequences." And as this Court said in another document subpoena case:

> The decision to seek use immunity necessarily involves a *balancing* of the Government's interest in obtaining

36 The OIC, in its brief, quotes from the dissent in *Braswell*, but ignores this language in the opinion of the Court.

> information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation.

Doe I, 465 U.S. at 616 (emphasis added).

The Office of Independent Counsel proceeded below heedless of these warnings. It did no balancing at all. It obtained the immunity order for the purpose of prosecuting the immunized witness. And because it conferred immunity at the beginning of the investigation, it did not even attempt to establish any "legitimate independent sources" for its evidence.

In the twenty-three years since *Fisher*, there are only two or three reported cases in which the Department of Justice has attempted to prosecute a person after compelling production of non-corporate documents under immunity.[37] And there are *no* cases in which the Department of Justice *began* its investigation by compelling a subject to produce documents under immunity and then indicted the subject. We submit that this is not a practice to be encouraged, and that in most cases — including this one — the immunity statute will not permit it.[38]

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37 *See United States v. Neely*, No. 94-5107, 1996 U.S. App. LEXIS 2106, at *29 n.9 (4th Cir. Feb. 13, 1996) (unpublished) (approving use of documents produced under immunity in narcotics and money laundering prosecution, without discussing *Kastigar*), *cert. denied*, 519 U.S. 861 (1996); *In re Steinberg*, 837 F. 2d 527, 530 (1st Cir. 1988) (rejecting argument that contents of documents could not be used because they were privileged under *Boyd v. United States*, 116 U.S. 616 (1886); *Kastigar* neither raised nor discussed).

38 Wigmore, in his famous treatise on the Fifth Amendment privilege, made this point forcefully:

> The privilege, together with the requirement of probable cause prior to prosecution, protects the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of real concern to society.
>
> The concern here is mainly with the "fishing expedition," with what under Elizabeth and James amounted to the unlawful process of poking about in the speculation of finding something chargeable.
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> * * * * *
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> Each of us, after all, is a criminal more or less. But as to most of our crimes we are, practically speaking, the indispensable threshold witnesses . . . . it would be a frightening situation if the system were constructed so that the prosecutor had it within his power to select from all of the crimes of all of us the ones to pursue.
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> The place to nip this specter may be in the bud — by depriving the state of authority to compel self-incriminatory disclosures . . . . Sometimes . . . in grand jury, legislative and administrative agency inquiries, where there is no probable-cause requirement, there is only the privilege against self-incrimination to perform this function.

8 Wigmore, *supra*, § 2251, at 314-15 (footnotes omitted). *See also Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting and quoting from Mr. Justice Jackson's (then Attorney General Jackson's) famous address to the United States Attorneys on April 1, 1940).

III. THE FOREGONE CONCLUSION EXCEPTION DOES NOT APPLY

The Office of Independent Counsel, at the end of its brief, also asks this Court to hold that Mr. Hubbell had no valid Fifth Amendment privilege in the first place. In support of this position, the Office of Independent Counsel argues that the existence and Mr. Hubbell's possession of the myriad documents called for by the subpoena were a "foregone conclusion" within the meaning of the *Fisher* case at the time the subpoena was served. The basis of the OIC's

argument is its contention that existence and possession of records by any person or businessman of the type sought in the subpoena are a "foregone conclusion." This argument is completely without merit.

The first problem with the Independent Counsel's argument is that it has been waived. The argument that the witness has no valid claim of privilege should be raised when the privilege is asserted. The OIC did not challenge Mr. Hubbell's assertion of the privilege then; instead, it accepted the claim and procured an immunity order compelling production. Later, when Mr. Hubbell moved to dismiss the indictment, the OIC conceded in the district court—deliberately, forcefully and repeatedly—that Mr. Hubbell had a valid Fifth Amendment privilege to decline to turn over any documents absent immunity. In its district court brief the OIC stated in the clearest possible terms that the Fifth Amendment *does* apply to a subpoena for "business records":

> *Doe* and *Fisher* make it clear that because of these three "testimonial aspects of production," an individual who receives a federal grand jury subpoena that commands him to produce *business records* may assert his Fifth Amendment privilege against self-incrimination.

R. 303 (emphasis added). The OIC went on to tell Judge Robertson:

> For the purposes of this motion there is no factual dispute. Moreover, the legal dispute is limited. Both parties agree an individual can respond to a subpoena commanding

> *business records* by asserting his privilege against self-incrimination.

R. 311-12 (emphasis added). The issue has been thoroughly waived; and it is a fact-bound issue on which there is no record.[39]

Second, the argument made by the OIC—that existence and possession of ordinary business and financial records are a foregone conclusion for any businessman—is the exact same argument that this Court rejected in *Doe I*. In *Doe I*, the Justice Department wrote in its brief to this Court:

> Where the documents sought are standard business records, the act of production generally does not rise to the level of testimonial self-incrimination. By producing such records, a sole proprietor may tacitly admit they exist and are in his possession. But since such documents are kept by virtually every business from the smallest family concern to the largest conglomerate, these tacit assertions "add[] little or nothing to the sum total of the Government's information" and are thus not sufficiently testimonial to implicate the Fifth Amendment. Furthermore, the fact that a sole proprietorship possesses the sort of documents maintained by virtually all businesses (as distinct from the contents of the document) is hardly incriminating.

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39 Since the court of appeals considered this issue anyway, this Court may of course choose to consider it too. There are, however, compelling reasons not to. For example, there will, of course, never be any record because of the conditional misdemeanor plea resolving the case below.

Govt's Br. in *Doe I* at 9. Instead of accepting this argument, the Court first noted that "[r]espondent did *not* concede in the District Court that the records listed in the subpoena actually existed or were in his possession," and then held that "[t]he act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity . . . ." 465 U.S. at 614 n.13, 617 (emphasis added).[40]

Third, the government's argument was rejected in *Doe I* for a good reason. The "foregone conclusion" exception is properly available only where the circumstances are such that the witness is not giving testimony about what documents he has. It is wrong to postulate that just because the government believes a witness to be a "businessman" the government no longer relies on his truthtelling in obtaining full compliance with a subpoena for some of his business records.

The point is made, simply, by reference to the subpoena in this case. When the OIC asked Mr. Hubbell to produce "[a]ny and all documents reflecting, referring or relating to any direct or indirect sources of money or other things of value received by or provided by Webster Hubbell, his wife, or children," J.A. 47, the OIC plainly had no idea whether he had one such document, ten, or several hundred. It had no idea whether any such documents that did exist consisted of bank deposit receipts, check stubs or took some completely different form. The OIC was entirely dependent on Mr. Hubbell's truthtelling for compliance. When the OIC asked Mr. Hubbell to produce "[a]ny and all documents reflecting, referring or relating to time worked or billed by Webster Hubbell," *id.*, it had no idea whether Mr. Hubbell

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40 The records sought in *Doe I* are indistinguishable from those sought here. *Compare Doe I*, 465 U.S. at 607 n.1, *with* the subpoena issued to Mr. Hubbell (J.A. 47-49).

maintained timesheets or kept no such records at all. And when it asked Mr. Hubbell to produce, for example, "[a]ny and all documents reflecting, referring or relating to any retainer agreements," J.A. 48, it had no idea whether there were any such documents, and if so, how many. The OIC relied completely on Mr. Hubbell's truthtelling to find out what documents Mr. Hubbell had. If there had been a "smoking gun" document, the OIC would have learned of its existence only from Mr. Hubbell's compliance. "Testimony" was clearly involved in complying with this subpoena, and the foregone conclusion standard was not satisfied.[41]

Finally, the Office of Independent Counsel's argument is based on a misreading of *Fisher*. The OIC assumes *Fisher*'s "foregone conclusion" holding rested on the nature of the documents subpoenaed there,[42] when in fact *Fisher*'s foregone conclusion holding rested on the fact that the existence and location of the records were undisputed. The parties in *Fisher* had agreed and stipulated that the

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41 To make matters worse for the OIC, Mr. Hubbell had been in jail for over a year when the subpoena was served. Thus, even if most businessmen have records, the same may not be said for records of a defunct business whose ex-proprietor has been in jail for a year.

42 The OIC says that "[b]ecause the subpoena in this case, like the subpoena in *Fisher*, called only for specified categories of ordinary business records, the decision in *Fisher* calls for the same conclusion here . . . ." OIC Br. at 33-34. This statement is also factually incorrect. The summonses in *Fisher* were *far* narrower than the subpoena here. The subpoena here is, however, almost the same as the subpoena at issue in *Doe I* that is described in detail in the opinion, 465 U.S. at 607 n.1; and in *Doe I* the government's foregone conclusion argument was rejected. So *if* the foregone conclusion argument did turn simply on the nature of the subpoenaed documents, which it does not, this Court's decisions would still be fatal to the OIC's position.

documents had been created by the accountants and transferred to the attorney.[43]

Every single lower court to consider the issue has correctly understood the foregone conclusion issue to turn on the degree of knowledge by the government regarding the existence and witness's possession of the documents.[44] The

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[43] The Office of Independent Counsel understands this perfectly well. In its brief below, the OIC told the court of appeals that *Fisher* "held that the existence of documents whose existence had been *stipulated* by the taxpayer was a 'foregone conclusion.'" App. Br. at 43 (emphasis added). The stipulation is found at *United States v. Fisher*, 500 F.2d 683, 685 (3d Cir. 1974).

[44] *See In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87 (2d Cir. 1993) (where defendant had testified before SEC as to possession of diary, and had previously provided a copy which the government suspected had been altered, subpoena for original does not implicate the Fifth Amendment); *In re Steinberg*, 837 F.2d 527 (1st Cir. 1988) (where government witness had testified as to existence and contents of specific notebooks sought by subpoena, subpoena does not implicate the Fifth Amendment); *United States v. Clark*, 847 F.2d 1467 (10th Cir. 1988) (finding existence of accountants' work papers, which were known to have been given to taxpayer's attorney, to be a foregone conclusion); *United States v. Rue*, 819 F.2d 1488 (8th Cir. 1987) (some subpoenaed documents had previously been shown to and reviewed by IRS agent, and existence of remainder had been acknowledged); *In re Grand Jury Proceedings on Feb. 4, 1982*, 759 F.2d 1418 (9th Cir. 1985) (act of producing documents in response to extremely broad subpoena held to be testimonial); *United States v. Fox*, 721 F.2d 32 (2d Cir. 1983) (act of producing documents in response to broad subpoena seeking a wide range of personal financial and business records held privileged); *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983) (act of producing documents in response to highly specific subpoena reflecting detailed knowledge of requested documents held not to be privileged where existence and possession were not in dispute); *In re Katz*, 623 F.2d 122 (2d Cir. 1980) (privilege upheld where government failed to make particularized showing that existence of business records was a foregone conclusion); *United States v. Praetorius*, 622 F.2d 1054 (2d Cir. 1979) (act of producing passport not privileged where existence and location were not in question), *cert. denied sub nom. Leber v. United States*, 449 U.S. 860 (1980).

reasonable particularity standard has been adopted by the Second Circuit, and now by the D.C. Circuit.[45] It has worked well in the Second Circuit. The government has been able to overcome the privilege in several cases where, instead of issuing a broad subpoena at the beginning of its investigation, it issued a narrow one after developing specific and conclusive evidence regarding recordkeeping at a particular business establishment.[46]

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[45] *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87 (2d Cir. 1993). The First Circuit has suggested that the government must establish "no doubt" that the item exists. *United States v. Anello*, 705 F.2d 253 (1st Cir. 1985). *See also* Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, 3 *Criminal Procedure* 2d § 8.13, at 262-63 (1999).

[46] *See, e.g., In re Grand Jury*, 1 F.3d 87; *United States v. Walker*, 982 F. Supp. 288 (S.D.N.Y. 1997) (witness' former employee told government of existence of subpoenaed records); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 13, 1984*, 616 F. Supp. 1159 (E.D.N.Y. 1985) (government submitted affidavit demonstrating particularized knowledge).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 99-166

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases	Page
Boyd v. United States, 116 U.S. 616 (1886)	3
Fisher v. United States, 425 U.S. 391 (1976)	2
Kastigar v. United States, 406 U.S. 441 (1972)	1, 2, 3
Pennsylvania v. Muniz, 496 U.S. 582 (1990)	4
Schmerber v. California, 384 U.S. 757 (1966)	3
South Central Bell Tel. Co. v. Alabama, 119 S.Ct. 1180 (1999)	5
United States v. Doe, 465 U.S. 605 (1984)	3
United States v. Williams, 504 U.S. 36 (1992)	6
Constitutional Provisions, Statutes and Rules	
U.S. CONST. amend. V	*passim*
18 U.S.C. § 6002	1, 2
S. Ct. R. 15.2	5

IN THE

Supreme Court of the United States

No. 99-166

UNITED STATES OF AMERICA,
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v.

WEBSTER L. HUBBELL,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE UNITED STATES

1. The most salient feature of respondent's brief is its conspicuous failure to grapple with the questions presented by the analysis of the court of appeals. That failure is most evident in respondent's persistent emphasis on Section 6002 and on *Kastigar v. United States*, 406 U.S. 441 (1972). Respondent's fundamental position (*e.g.*, Resp. Br. 11-12, 16-17), echoed by amicus National Association of Criminal Defense Lawyers, seems to be that *Kastigar* directly bars the government from prosecuting respondent after compelling respondent to produce documents under Section 6002. Read literally, that suggests the obviously false idea that Section 6002 confers transactional immunity. *See Kastigar*, 406 U.S. at 453 (interpreting Section 6002 to grant use immunity and finding the statute constitutional on that basis).

More generously, respondent's argument rests on the implicit premise that the product of compulsion under Section 6002 is the documents themselves. That premise, however, reflects a complete misunderstanding of the operation of Section 6002. As the *Kastigar* Court explained, the immunity that accompanies compulsion under Section 6002 is precisely limited to the constitutional minimum: The immunity extends only to incriminating testimonial communications that the government otherwise could not obtain. 406 U.S. at 453. With respect to an order compelling the production of documents, that immunity applies not to the production generally, but only to the testimonial component of the production, the implicit admission of the respondent that certain documents responsive to the subpoena exist in the respondent's possession or control and that those documents are the ones delivered in response to the subpoena. *See Fisher v. United States*, 425 U.S. 391, 410, 413 (1976).

Thus, the immunity under Section 6002 does not directly extend to the documents at all. Rather, it is quite narrow, limited to those testimonial communications that might be implicit in the act of production. Any application to the contents of the documents themselves must be justified by some theory as to how the previously recorded documents can be treated as derived from the after-the-fact implicit testimonial communications.

It is that point, of course (which respondent more or less ignores), that is the center of this case: From what are the contents of the produced documents derived? Because *Kastigar* did not deal with document production, it offers nothing to assist the Court in determining when the contents of documents are derived from those privileged implicit testimonial communications rather than from the unprivileged physical act of production itself. For that question, the Court must turn to its cases analyzing the production of documents specifically and, more generally, distinguishing between testimonial and non-testimonial communications. Thus, respondent's refusal to go beyond *Kastigar* itself—respondent's brief does not even attempt to explain the dispositive portion of *United States v. Doe*, 465 U.S. 605 (1984)—leaves respondent with a position no more persuasive than the automatic-taint view of the court of appeals. *See* Resp. Br. 31 n.33 ("Our position is that where the 'testimony' compelled by the act of production is that the responsive documents exist, the documents are tainted.").

For the reasons explained in our opening brief (U.S. Br. 17-32), two strands of this Court's existing jurisprudence strongly support our view that the contents of the produced documents are derived from the unprivileged physical act of production itself rather than the privileged communications implicit in that act. The first (U.S. Br. 26-32) is the long line of cases which builds on *Schmerber v. California*, 384 U.S. 757 (1966). These cases emphasize the importance of limiting the privilege against compelled self-incrimination to testimonial communications and recognizing the ability of the government to use other types of compulsion in the course of criminal investigations. The second (U.S. Br. 12-17) is the emphatic rejection in *Fisher* of the doctrine of *Boyd v. United States*, 116 U.S. 616 (1886). Respondent's automatic-taint view is inconsistent with both of those lines of authority.

The central analytical flaw of respondent's presentation is his conflation of the tangible documents with respondent's tacit testimony as to what documents he had. *See, e.g.*, Resp. Br. 16 (arguing that the compelled disclosure of "what documents he had" barred the government from "us[ing] those documents to build a criminal case against him"). The problem with that analysis is that it denies

the existence of a physical component of the act of production, unprotected by the constitutional privilege. As the Department of Justice aptly explained in its amicus brief on the merits, this Court's decision in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), illustrates the fallacy of respondent's reasoning: The Court permitted the use of the nontestimonial results of the compelled activity, but required suppression of the information derived from testimonial components of the compelled activity. DOJ Br. 23-24. Because respondent does not even acknowledge the existence of the nontestimonial component of the act of production, he offers nothing to rebut our explanation of why the government's access to the contents of the documents should be treated as derived from the unprotected physical component—the act of delivering the documents—rather than the implicit testimonial component—the admission of the document's existence.

2. Respondent also contends (*e.g.*, Resp. Br. 34) that this case reflects a rare investigative practice, pointing to the paucity of reported decisions analyzing the propriety of similar investigative practices. We reject the implication that acceptance of the analysis of the court of appeals would have no significant effect on important prosecutorial interests.

Respondent's argument rests on the mistaken premise that the Court can obtain an accurate picture of prosecutorial practice by reviewing the facts of reported privilege cases. For several reasons, the universe of reported decisions is unlikely to provide an accurate picture of the universe of prosecutions as a whole. Among other things, in many cases the compelled information will not be sufficiently incriminating to warrant prosecution; in many cases in which a prosecution is brought, the defendant (for the reasons explained in our opening brief) will assume that any assertion of the privilege will fail; and

even if an objection is raised, in many cases the prosecution will be resolved by a guilty plea without any trial or reported disposition. Thus, the limited discussion of cases like this one in the reporters does not suggest that the procedures followed in this case are unusual.

A better guide to the importance of the questions presented comes from the views of the Nation's central prosecutorial authority. On that point, as the Department of Justice stated in its brief supporting rehearing en banc in the court of appeals (and in its motion for divided argument in this Court), the appellate court's decision implicates important and common practices. The Department explained that the ruling of the court of appeals would be "likely to impose significant burdens on the prosecution of a specific category of criminal investigations, [particularly document-heavy cases such as] a tax or health care fraud investigation [in which it may be appropriate to] seek all of the records of a physician who runs his practice as a sole proprietorship." DOJ Reh'g Response 9.

3. Respondent also contends (Resp. Br. 36-37) that the government has waived the second question on which the Court granted review—the applicability of the foregone-conclusion doctrine. For three separate reasons, that contention should not concern the Court. First, and most obviously, it is too late in the day for respondent to present that kind of procedural objection. If respondent thought the question was not properly part of the case, the time for bringing that point to the Court's attention was when respondent filed his brief in opposition. *See South Central Bell Tel. Co. v. Alabama*, 119 S. Ct. 1180, 1186 (1999); S. Ct. R. 15.2. Furthermore, it is plain that the government pressed the question in the court of appeals and that the court of appeals actually decided the question. Hence, whatever the merits of respondent's

claims about the state of the record, the question is now properly before this Court. *See United States v. Williams*, 504 U.S. 36, 40-45 (1992).

Finally, respondent's objection mischaracterizes the state of the record. As respondent's own quotations illustrate (Resp. Br. 36-37), the most that respondent can say is that the government acknowledged the obvious truth that respondent is entitled to assert a privilege. That is vastly different from waiving any particular argument the government might have for overcoming respondent's assertion of the privilege. The government expressly claimed in the district court that the act of production in this case was insufficiently incriminating to warrant suppression. R. 37, at 15, *reprinted in* C.A. App. 310 ("If the [testimony implicit in production] is not self-incriminating testimony, there are no Fifth Amendment implications, the records cannot be tainted, and no hearing is required. Such is the case here."). As the court of appeals recognized by proceeding to address the point, that argument adequately preserved the foregone-conclusion question presented by the petition.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the district court for implementation of the plea agreement.

Respectfully submitted,

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January 2000

No. 99-166

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

WEBSTER L. HUBBELL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES DEPARTMENT OF JUSTICE AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's privilege against self-incrimination protects information previously recorded in voluntarily created documents that a defendant delivers to the government pursuant to an immunized act of production.

2. Whether a defendant's act of producing ordinary business records constitutes a compelled testimonial communication solely because the government cannot identify the documents with reasonable particularity before they are produced.

TABLE OF CONTENTS

	Page
Interest of the United States Department of Justice	1
Statement	2
Summary of argument	9
Argument:	
A grant of act-of-production immunity does not bar the government from using the contents of voluntarily prepared documents that it obtains by compelling compliance with a grand jury subpoena	12
A. Compelled disclosure of pre-existing, voluntarily created documents is not, in and of itself, a form of compelled testimony	13
B. The act of production has testimonial significance only insofar as it implicitly communicates information that has not voluntarily been reduced to writing	16
C. The contents of subpoenaed documents are not tainted fruits of the act of production	20
D. The existence of ordinary business and financial records is generally a foregone conclusion	28
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 (1976)	16, 17
Baltimore City Dep't of Social Servs. v. *Bouknight*, 493 U.S. 549 (1990)	16, 26
Boyd v. *United States*, 116 U.S. 616 (1886)	10, 14
Braswell v. *United States*, 487 U.S. 99 (1988)	15
Doe v. *United States*, 487 U.S. 201 (1988)	9, 14, 22

Cases—Continued: Page

Fisher v. *United States*, 425 U.S. 391 (1976) ..... *passim*
Gilbert v. *California*, 388 U.S. 263 (1967) 14
Harris, In re, 221 U.S. 274 (1911) 29
Holt v. *United States*, 218 U.S. 245 (1910) 14
Kastigar v. *United States*, 406 U.S. 441 (1972) 3, 12-13, 22, 28
Pennsylvania v. *Muniz*, 496 U.S. 582 (1990) 14, 23, 24
Schmerber v. *California*, 384 U.S. 757 (1966) 14
United States v. *Dionisio*, 410 U.S. 1 (1973) 14, 24
United States v. *Doe*, 465 U.S. 605 (1984) 5, 13, 15, 17, 18 19, 20, 24, 27, 30
United States v. *Fishman*, 726 F.2d 125 (4th Cir. 1983) 30
United States v. *North*, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991) 7-8
United States v. *Stone*, 976 F.2d 909 (4th Cir. 1992), cert. denied, 507 U.S. 1029 (1993) 30
United States v. *Wade*, 388 U.S. 218 (1967) 14

Constitution and statutes:

U.S. Const. Amend. V ..... *passim*
Ethics in Government Act of 1978, 28 U.S.C. 591 *et seq.* 1, 2
28 U.S.C. 594(a)(9) 1
28 U.S.C. 594(e) 2
28 U.S.C. 597(b) 1
18 U.S.C. 371 4
18 U.S.C. 1341 4
18 U.S.C. 1343 4
18 U.S.C. 6002 ..... *passim*, 1a
18 U.S.C. 6003 ..... 1, 2, 7, 12, 17, 19, 20, 24, 1a
18 U.S.C. 6003(a) 3, 1a
26 U.S.C. 7201 4
26 U.S.C. 7206(2) 4
26 U.S.C. 7212(a) 4

Miscellaneous: Page

Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27 (1986) 25
Sara S. Beale, William C. Bryson, et al., *Grand Jury Law and Practice* (2d ed. 1997) 29

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BRIEF FOR THE UNITED STATES
DEPARTMENT OF JUSTICE AS AMICUS CURIAE

INTEREST OF THE UNITED STATES DEPARTMENT OF JUSTICE

This prosecution is being conducted by an Independent Counsel pursuant to the Ethics in Government Act of 1978, 28 U.S.C. 591 *et seq.*; see 28 U.S.C. 594(a)(9) (authorizing independent counsel to conduct prosecutions "in the name of the United States"). The Ethics in Government Act of 1978 provides that "[n]othing in [the Act] shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding." 28 U.S.C. 597(b). The question presented in this case, which involves the effect of a grant of act-of-production immunity pursuant to 18 U.S.C. 6002 and 6003, can be expected to arise in prosecutions conducted by

the United States Department of Justice. The Department therefore has a substantial interest in the resolution of the issue of law presented in this case.

STATEMENT

1. On August 5, 1994, the Special Division of the United States Court of Appeals for the District of Columbia Circuit responsible for appointing independent counsels under the Ethics in Government Act of 1978, 28 U.S.C. 591 *et seq.*, appointed an independent counsel and gave him authority to investigate matters that have generally been called "Whitewater." Pet. App. 2a-4a. On September 1, 1994, the Independent Counsel requested and received authorization from the Special Division under 28 U.S.C. 594(e) to investigate as well whether respondent Webster L. Hubbell had committed any criminal offenses "in his billing or expense practices while a member of the Rose Law Firm." Pet. App. 116a. Respondent subsequently pleaded guilty to two counts of mail fraud and tax evasion arising out of that referral and was sentenced to 21 months' imprisonment. *Id.* at 4a, 116a.

On November 1, 1996, while respondent remained incarcerated, the Independent Counsel served him with a subpoena in connection with grand jury proceedings in the United States District Court for the Eastern District of Arkansas. Pet. App. 24a, 128a; J.A. 46-53. The subpoena required production of all of respondent's business, financial, and tax records from January 1, 1993, until the date of the subpoena. *Id.* at 128a; see *id.* at 24a-25a n.12. Respondent refused to produce the documents, invoking his Fifth Amendment privilege against compelled self-incrimination. *Id.* at 25a-26a, 128a. The Independent Counsel obtained an order under 18 U.S.C. 6002 and 6003 compelling the production of documents and granting respondent immunity from incrimination "to the extent allowed by law." Pet. App. 26a, 128a; J.A. 60-61.[1] Respondent then produced 13,120 pages of documents to the Independent Counsel. Pet. App. 26a, 128a. Respondent also appeared before the grand jury and confirmed that he had produced all of the documents in his possession or control that were responsive to the 11 specifications of the subpoena. *Id.* at 26a; J.A. 62-70.

2. On January 6, 1998, the Special Division referred the following matter concerning respondent to the Independent Counsel:

> (i) whether [respondent] or any individual or entity violated any criminal law, including but not limited to criminal tax violations and mail and wire fraud, regarding [respondent's] income since January 1, 1994, and his tax and other debts to the United States, the State of Arkansas, the District of Columbia, the Rose Law Firm, and others; and
>
> (ii) whether [respondent] or any individual or entity violated any criminal law, including but not limited to obstruction of justice, perjury, false statements, and mail and wire fraud, related to payments that [respon-

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[1] Pursuant to 18 U.S.C. 6003(a), a district court may issue "an order requiring [an] individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination." When such an order is issued, "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. 6002. This Court has held that "the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it." *Kastigar* v. *United States*, 406 U.S. 441, 462 (1972).

dent] has received from various individuals and entities since January 1, 1994.

Pet. App. 5a, 117a; J.A. 71-72.

On April 30, 1998, a grand jury sitting in the United States District Court for the District of Columbia returned a ten-count indictment against respondent; his wife, Suzanna Hubbell; his accountant, Michael Schaufele; and his tax lawyer, Charles Owen. Pet. App. 5a, 26a-27a, 117a. The indictment charged the defendants with conspiracy, in violation of 18 U.S.C. 371; impeding and impairing the Internal Revenue Service, in violation of 26 U.S.C. 7212(a); tax evasion, in violation of 26 U.S.C. 7201; aiding the preparation of a false income tax return, in violation of 26 U.S.C. 7206(2); and four counts of mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343. Pet. App. 26a-27a. The tax and fraud counts alleged a scheme to avoid paying taxes that respondent had agreed to pay as part of his 1994 guilty plea, as well as taxes on income that respondent had received after leaving the Department of Justice in 1994. *Id.* at 27a-28a, 117a. In developing the evidence of the offenses for which respondent was indicted, the Independent Counsel concededly used the contents of the documents acquired pursuant to subpoena. See *id.* at 26a, 113a-114a, 128a.

3. Respondent moved to dismiss the indictment. He argued, *inter alia*, that the Independent Counsel's use of documents acquired from respondent pursuant to subpoena violated respondent's rights under the Fifth Amendment. The district court upheld respondent's Fifth Amendment claim and granted the motion to dismiss. Pet. App. 113a-143a.[2]

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[2] Respondent and his co-defendants also argued that the Special Division had no authority to make the January 6, 1998, referral to the Independent Counsel without the concurrence of the Attorney General. The district court agreed, Pet. App. 123a-127a, but the court of appeals reversed, *id.* at 2a-22a. Respondent has not sought further review of that ruling.

The court acknowledged that "the contents of voluntarily prepared documents are never protected by the Fifth Amendment privilege." Pet. App. 131a. The court added, however, that the "act of production" even of unprivileged documents may have "testimonial aspects." *Id.* at 132a (citing *Fisher* v. *United States*, 425 U.S. 391, 410-411 (1976), and *United States* v. *Doe*, 465 U.S. 605, 612-613 (1984)). The court stated that "[t]he testimonial aspects of the act of production are: (1) that documents exist; (2) that the person producing them possessed them; and (3) that they are authentic." Pet. App. 132a. It concluded that respondent's compliance with the subpoena constituted "testimony" within the meaning of the Fifth Amendment because it revealed the existence of documents of which the Independent Counsel had previously been unaware. *Id.* at 133a-134a. Because the Independent Counsel conceded that it had "used the contents of these documents to identify and develop evidence that led to this prosecution," *id.* at 128a, the court held that respondent's Fifth Amendment rights had been violated and granted the motion to dismiss the indictment, *id.* at 133a-137a.

4. The court of appeals vacated the district court's judgment and remanded the case for further proceedings under a legal standard that presupposes that the contents of subpoenaed records may be regarded as tainted fruit of the subpoena recipient's implicit acknowledgment that the records exist. Pet. App. 1a-112a.

a. The court of appeals acknowledged that "the Fifth Amendment does not protect the contents of pre-existing, voluntarily prepared documents." Pet. App. 31a. The court of appeals also noted, however, that "[w]hile the contents of preexisting documents are not protected, the [Supreme] Court has acknowledged that there are testimonial and

potentially incriminating communications inherent in the act of responding to a subpoena which may themselves be protected by the Fifth Amendment." *Ibid.* The court described those communications as follows:

> the act of production communicates at least four different statements. It testifies to the fact that: i) documents responsive to a given subpoena exist; ii) they are in the possession or control of the subpoenaed party; iii) the documents provided in response to the subpoena are authentic; and iv) the responding party believes that the documents produced are those described in the subpoena.

Id. at 32a. The court then turned to whether respondent's act of production had "testimonial value" and whether any such implicit testimony had the potential for "incrimination." *Id.* at 35a.

The court of appeals observed that, while not every act of production communicates sufficient information to be deemed "testimonial" within the meaning of the Fifth Amendment, Pet. App. 37a, a particular act of production will have implicit testimonial aspects unless the government can establish that it knew, before the subpoena was issued, "of the existence, possession, and authenticity of subpoenaed documents with 'reasonable particularity.'" *Id.* at 59a. The court of appeals held that "[o]n remand, the district court should hold a hearing in which it seeks to establish the extent and detail of the government's knowledge of [respondent's] financial affairs (or of the paperwork documenting it) on the day the subpoena issued," to determine whether the "reasonable particularity" test was met. *Id.* at 61a. The court of appeals also stated that, while it appeared that respondent faced both direct and indirect incrimination from the act of production, it would leave to the district court on remand the determination whether any testimonial component of respondent's act of production was incriminating. *Id.* at 62a-65a.

b. The court of appeals then addressed the question whether the grant of immunity to respondent pursuant to 18 U.S.C. 6002 and 6003 precluded the Independent Counsel from using the contents of the documents produced in response to the subpoena. The Department of Justice, appearing as amicus curiae, argued that because voluntarily prepared documents are not protected by the Fifth Amendment privilege, they provide an independent source for any information contained within the documents themselves. Under that approach, the government remains free to use the contents of subpoenaed documents, even in situations where the act of production has a meaningful testimonial component, so long as "the government does not mention the mechanics through which it obtained those documents, and [so long as] the documents are sufficiently self-explanatory and self-referential to establish their own nexus with the defendant." Pet. App. 67a.[3]

The court of appeals rejected that approach, because it "obviated the need for prior knowledge that the documents actually exist." Pet. App. 67a. It held instead that "[o]nce the documents appear and are examined, such that their existence enters the consciousness of the prosecutor, the United States has offered no means through which the government can establish that its evidence 'is not directly or *indirectly* derived from such testimony' as to their existence." *Id.* at 68a (quoting *United States* v. *North*, 920 F.2d

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[3] As the court of appeals explained, the Department of Justice "invite[d] the court to compare what the government learns from the act of production with what it would know if the documents in question just appeared on its doorstep. That intellectual exercise, [the Department] argue[d], separates the information conveyed through the act of production with what could be deciphered from the records themselves." Pet. App. 66a.

940, 946 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991)). The court of appeals concluded that

> [i]f the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence, let alone their possession by the subpoenaed party, and cannot prove knowledge of their existence through any independent means, *Kastigar* forbids the derivative use of the information contained therein against the immunized party.

Pet. App. 71a.

c. Judge Williams dissented from the court of appeals' disposition of respondent's Fifth Amendment claim. Pet. App. 100a-112a. Judge Williams first observed that in the present case, the Independent Counsel had not sought to use respondent's act of production either to show respondent's prior possession of the records or to establish their authenticity. *Id.* at 104a-105a. He also rejected the majority's conclusion that the documents themselves were the tainted fruit of respondent's implicit admission of "the existence of the papers *demanded*." *Id.* at 105a (quoting *Fisher*, 425 U.S. at 410) (emphasis added in Judge Williams's opinion). Judge Williams explained:

> If the government could refer back to the subpoena to identify documents and to clarify relationships that were not clear on their face or by other independent means, then it would be using a testimonial component of the transaction—the witness's implicit statement that the documents match the subpoena's description. [Respondent's] claim for blanket exclusion of the contents, by contrast, relies on existence in a quite different sense—the fact that these particular pieces of paper are in being. But this is quite easily confirmed by these papers' own physical presence, which is "self-evident" at the time and place of production and so long thereafter as the government maintains proper custody.

Pet. App. 105a. Consistent with the submission of the Department of Justice, Judge Williams concluded that "[s]ensibly construed, the act of production doctrine shields the witness from the use of any information (resulting from the subpoena response) beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked." *Id.* at 111a. That test, he observed, would protect against exploitation of "any testimonial aspect of the act of production." *Ibid.*

SUMMARY OF ARGUMENT

A. In a variety of circumstances, this Court has held that the government may compel a suspect to perform a physical act, even where the result of the act is that the government acquires incriminating evidence. The Court has applied that principle to the production of documents, holding that an individual may not resist a subpoena on the ground that the contents of the requested documents are likely to incriminate him. Although the Fifth Amendment protects the individual against the compelled, incriminating disclosure of "the contents of his own mind," *Doe* v. *United States*, 487 U.S. 201, 211 (1988), the privilege does not extend to thoughts and understandings that have been voluntarily committed to writing. When an individual elects to create a written record of his mental impressions, the resulting document is a physical object that can be acquired and used by the government according to the same rules that generally govern the acquisition and use of physical evidence.

B. Although the Fifth Amendment privilege does not extend to the contents of voluntarily created documents, an individual's compliance with a subpoena may have the practical effect of providing the government with incriminating information that cannot be gleaned from examination of the records themselves. And because the act of production may reveal thoughts and understandings that have not voluntarily been committed to writing, their compelled

disclosure raises Fifth Amendment concerns. An individual may therefore have a valid Fifth Amendment objection to a document subpoena, notwithstanding the unprivileged character of the documents themselves. This Court has held that by granting use immunity under 18 U.S.C. 6002 and 6003, prosecutorial officials can obtain and use the contents of potentially incriminating documents, while protecting a subpoena recipient against self-incrimination by any admissions that might be implicit in the act of production.

C. The question in a case in which act-of-production immunity has been granted is to determine what uses—direct and indirect—of any implicit testimonial communication are precluded by the grant of immunity. The court of appeals' approach views uses of the *contents* of the produced documents as tainted by the act of production in every case in which the government lacks reasonably particular knowledge of the documents' existence and their possession by the subpoena recipient before production is made. That approach comes close to reviving the doctrinal consequences of *Boyd* v. *United States*, 116 U.S. 616 (1886), under which the Fifth Amendment protected against the production of private papers based on their incriminating contents. The correct approach requires distinguishing between uses (and derivative uses) of the unprivileged physical act of production, and uses (and derivative uses) of the immunized testimonial aspects of the act of production.

The government's use of the contents of subpoenaed documents is not derived from any testimonial component of the subpoena recipient's act of production. Rather, the contents are obtained through the act of production *qua* physical act. As the dissenting judge in the court of appeals explained, the consequence of use immunity is to "shield[] the witness from the use of any information (resulting from the subpoena response) beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked." Pet. App. 111a. The standard

espoused by the dissenting judge—*i.e.*, that the government may examine and use the contents of subpoenaed documents so long as it does so without reference to the implicit testimonial aspects of their production—fully protects a subpoena recipient's Fifth Amendment rights while permitting the government to acquire and use pre-existing physical evidence.

Contrary to the court of appeals' holding, the government's acquisition and use of documents under act of production immunity is not the tainted fruit of an implicit admission that the produced documents exist. Any such admission would have no independent testimonial significance, since it would communicate no information distinct from the contents of the (unprivileged) documents themselves. The government gains access to those contents as a result of the physical act of production, not by virtue of any admissions implicit in that act. And, unless the government must (or does) elucidate the meaning of the documents by reference to testimonial aspects of the act of production, there is no improper exploitation of those testimonial aspects.

D. In any event, both the existence and a subpoena recipient's possession of the sorts of routine financial records demanded in this case would generally be a "foregone conclusion," *Fisher* v. *United States*, 425 U.S. 391, 411 (1976), at the time the subpoena was issued. The court of appeals thus erred by requiring highly specific knowledge of particular papers. An implicit admission of possession of ordinary financial documents does not rise to the level of a testimonial communication under the Fifth Amendment. *Ibid.*

ARGUMENT

A GRANT OF ACT-OF-PRODUCTION IMMUNITY DOES NOT BAR THE GOVERNMENT FROM USING THE CONTENTS OF VOLUNTARILY PREPARED DOCUMENTS THAT IT OBTAINS BY COMPELLING COMPLIANCE WITH A GRAND JURY SUBPOENA

An individual's compliance with a subpoena for documents—his "act of production"—entails two basic consequences. First, the act of production effects a physical transfer of pre-existing physical evidence, bringing the documents within the dominion and control of the government and thereby allowing the government to examine their contents. So long as the documents were voluntarily created, that transfer of possession does not, in and of itself, involve any form of compelled testimony. Second, an individual's obligation to produce the documents described in a subpoena may as a practical matter implicitly require him to communicate information that cannot be gleaned from inspection of the documents themselves. The individual's production tacitly admits, for example, that responsive documents exist, were within his control at the time the subpoena was issued, and are thought to be authentic. Because those implied admissions were not voluntarily committed to writing, an order effectively compelling their disclosure raises Fifth Amendment concerns.

Under 18 U.S.C. 6002 and 6003, an individual may be compelled to give testimony, notwithstanding his claim of Fifth Amendment privilege, subject to the condition that neither the testimony, nor any information directly or indirectly derived from that testimony, may be used against him in any criminal case. This Court has squarely held that the immunity granted by Section 6002 "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Kastigar* v. *United States*, 406 U.S. 441, 453

(1972). This Court has also specifically approved use immunity under Sections 6002 and 6003 as a method by which the government can obtain and use the contents of voluntarily created documents—which are not themselves protected by the Fifth Amendment privilege—while ensuring that a subpoena recipient is not incriminated by any admissions that might be implicit in the act of production. See *United States* v. *Doe*, 465 U.S. 605, 614-617 (1984) (*Doe I*).

The analysis of the court of appeals—which treats the *contents* of the subpoenaed records as presumptively derived from the testimonial aspects of a subpoena recipient's act of production—effectively subverts this Court's unequivocal holdings that the Fifth Amendment does not protect the contents of voluntarily created documents. The court of appeals' analysis is also untenable on its own terms. The government's possession of subpoenaed documents, and its consequent ability to make investigative and evidentiary use of their contents, is the result of the purely physical aspects of respondent's act of production, not the fruit of any compelled *testimony*.

A. Compelled Disclosure Of Pre-Existing, Voluntarily Created Documents Is Not, In And Of Itself, A Form Of Compelled Testimony

1. The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The protections of the Amendment thus come into play only when there is the confluence of compulsion, testimonial communication, and incrimination. See *Fisher* v. *United States*, 425 U.S. 391, 408 (1976). Where the compulsion does not produce testimonial communication, but instead requires a physical act, a suspect may be "compelled" to assist the government in the investigation of crime.

The Court has applied that principle in many contexts. For example, an individual may be compelled to furnish a

blood sample, *Schmerber* v. *California*, 384 U.S. 757, 760-765 (1966); to provide a handwriting exemplar, *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967), or a voice exemplar, *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973); to stand in a lineup, *United States* v. *Wade*, 388 U.S. 218, 221-223 (1967); or to wear particular clothing, *Holt* v. *United States*, 218 U.S. 245, 252-253 (1910). "These decisions are grounded on the proposition that 'the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.'" *Doe* v. *United States*, 487 U.S. 201, 210 (1988) (*Doe II*) (quoting *Schmerber*, 384 U.S. at 761). "It is the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind, that implicates the Self-Incrimination Clause." *Doe II*, 487 U.S. at 211 (citations and internal quotation marks omitted); see *id.* at 213 (privilege against compelled self-incrimination serves "to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government"); accord *Pennsylvania* v. *Muniz*, 496 U.S. 582, 595 n.9 (1990) ("nonverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another").

2. In *Boyd* v. *United States*, 116 U.S. 616 (1886), this Court held that the introduction into evidence of incriminating private papers that the defendant was compelled to produce violated the Fifth Amendment. The Court explained that it was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633. Under *Boyd*, the Fifth Amendment protected against the compelled production of private papers where the *contents* of those papers were incriminating.

The Fifth Amendment analysis in *Boyd*, however, "ha[s] not stood the test of time." *Fisher*, 425 U.S. at 407. In *Fisher* and in *Doe I*, this Court held that the Fifth Amendment provides no protection for the contents of voluntarily prepared documents, even when those documents are acquired by the government through subpoena over the owner's objection. As the Court observed in *Braswell* v. *United States*, 487 U.S. 99, 109 (1988), "the holding in *Fisher*—later reaffirmed in *Doe [I]*—embarked upon a new course of Fifth Amendment analysis."

The Court in *Fisher* explained that the Fifth Amendment privilege against self-incrimination "protects a person only against being incriminated by his own compelled testimonial communications." 425 U.S. at 409. Because the documents at issue in *Fisher* had been created voluntarily, the Court held that "they cannot be said to contain compelled testimonial evidence." *Id.* at 409-410; see *id.* at 409 (a subpoena for documents does not "compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought"). The Court further observed that an individual "cannot avoid compliance with [a] subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." *Id.* at 410. In *Doe I*, the Court reiterated that "[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." 465 U.S. at 612 n.10; see *id.* at 610 ("[w]here the preparation of business records is voluntary, no compulsion is present"); *id.* at 618 (O'Connor, J., concurring) ("the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind").

The thrust of *Fisher* and *Doe I* is that an individual's Fifth Amendment right to avoid compelled disclosure of "the contents of his own mind" extends only to thoughts and understandings that the individual has chosen not to ex-

press. When an individual voluntarily reduces his mental impressions to writing, the resulting document is a physical object that can be acquired and used by the government according to the same rules that generally govern the acquisition and use of physical evidence.[4] So long as the document is created voluntarily, neither the government's assertion of physical dominion over the object, nor the government's subsequent use of its contents for investigative or evidentiary purposes, raises any Fifth Amendment concern. As this Court recognized in *Baltimore City Department of Social Services* v. *Bouknight*, 493 U.S. 549, 555 (1990), *Fisher* and *Doe I* establish that "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded."

B. The Act Of Production Has Testimonial Significance Only Insofar As It Implicitly Communicates Information That Has Not Voluntarily Been Reduced To Writing

Although the Fifth Amendment privilege does not extend to the contents of voluntarily created documents, an individual's compliance with a subpoena may have the practical effect of providing the government with incriminating information "wholly aside from the contents of the papers produced." *Fisher*, 425 U.S. at 410. An individual who produces documents in compliance with a subpoena

[4] In *Andresen* v. *Maryland*, 427 U.S. 463, 471-473 (1976), the Court applied a similar analysis in rejecting the petitioner's contention, based on *Boyd*, that the seizure pursuant to warrant of his "personal business records" violated the Fifth Amendment. The Court found that the element of compulsion was lacking because "petitioner was not asked to say or do anything. The records seized contained statements that petitioner had voluntarily committed to writing." *Id.* at 473; see *id.* at 477 ("the statements seized were voluntarily committed to paper before the police arrived to search for them").

implicitly concedes that responsive records exist and that he possessed the records at the time of the subpoena's issuance. See *Doe I*, 465 U.S. at 614 n.13. His possession of the document, however, would not be apparent on the face of the records, and it could have evidentiary significance, for example, in proving the scienter element of a criminal offense. The act of production may also establish the authenticity of the relevant documents and thereby "relieve the Government of the need for authentication" at trial. *Ibid.* In addition, the producer's implicit representation that a particular document falls within the scope of a subpoena, see *Fisher*, 425 U.S. at 410, may assist the government or the trier of fact in interpreting a document that is ambiguous on its face. See Pet. App. 105a (Williams, J., dissenting). For Fifth Amendment purposes, the significance of the admissions implicit in the act of production is that they may reveal knowledge or mental impressions that—unlike the contents of the documents themselves—have not voluntarily been committed to writing.[5]

In both *Fisher* and *Doe I*, the question before the Court was whether a subpoena compelling the production of documents should be enforced over the recipient's claim of a Fifth Amendment privilege. In neither case had the subpoena recipient been granted use immunity pursuant to 18 U.S.C. 6002 and 6003. In each case the Court first considered, and rejected, the claim that a Fifth Amendment privilege attached to the contents of the documents. See *Fisher*, 425 U.S. at 407-410; *Doe I*, 465 U.S. at 610-612. The

[5] In that sense (and in that sense alone) the compelled production of documents pursuant to subpoena raises Fifth Amendment concerns that are not present when documents are acquired by search and seizure. Because "the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence," *Andresen*, 427 U.S. at 474, a search cannot elicit compelled admissions that go beyond the contents of the documents themselves.

Court then considered the question whether the subpoenas should nevertheless be quashed on the ground that the act of production could reasonably be expected to communicate incriminating information *over and above the information apparent from the documents themselves.*

In *Fisher*, the Court upheld enforcement of subpoenas that sought workpapers (see 425 U.S. at 394) prepared by accountants for two taxpayers and transferred to the taxpayers' lawyers. After rejecting the claim that incriminating contents could support a Fifth Amendment basis for resisting the compelled production of the workpapers, *id.* at 409-410, the Court stated that, in general, the act of production could have communicative aspects: "[c]ompliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control [by the subpoena recipient]," as well as indicating the recipient's "belief that the papers are those described in the subpoena." *Id.* at 410. On the facts of that case, however, the Court was "confident that however incriminating the contents of the accountant's workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination." *Id.* at 410-411. The Court found it "doubtful" that admitting the existence and possession of the subpoenaed records even rose "to the level of testimony," since "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Id.* at 411.

In *Doe I*, by contrast, the Court, while holding that "the contents of [the subpoenaed] records are not privileged," 465 U.S. at 612, accepted the conclusion of the district court and court of appeals that "the act of producing the documents would involve testimonial self-incrimination." *Id.* at 613. The respondent in that case "did not concede in the District Court that the records listed in the subpoena actually

existed or were in his possession. [He] argued that by producing the records, he would tacitly admit their existence and his possession." *Id.* at 614 n.13. The respondent also contended that "[b]y producing the documents, [he] would relieve the Government of the need for authentication." *Ibid.* The Court found that "[t]hese allegations were sufficient to establish a valid claim of the privilege against self-incrimination." *Ibid.*

The Court also observed, however, that the government "could have compelled respondent to produce the documents listed in the subpoena" through a grant of use immunity, pursuant to 18 U.S.C. 6002 and 6003. 465 U.S. at 614, 615. The Court specifically rejected the respondent's contention that "any grant of use immunity must cover the contents of the documents as well as the act of production." *Id.* at 617 n.17. The Court explained:

> To satisfy the requirements of the Fifth Amendment, a grant of immunity need be only as broad as the privilege against self-incrimination. As discussed above, the privilege in this case extends only to the act of production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records.

Ibid. (citations omitted). And in the concluding paragraph of its opinion, the Court reiterated its determination that the court of appeals had "erred in holding that the contents of the subpoenaed documents were privileged under the Fifth Amendment." *Id.* at 617. The Court explained that if that holding were allowed to stand, "respondent could argue on remand that any grant of use immunity must cover the contents of the records * * *. To avoid that result, we must reverse the decision below insofar as it held that the contents of the subpoenaed records are privileged." *Id.* at 617 n.18.

The Court in *Doe I* was not presented with, and did not discuss, what prohibitions would exist on the use of "information directly or indirectly derived" (18 U.S.C. 6002) from the immunized act of production. But the Court's explicit conclusion that the grant of immunity need not cover "the contents of the documents," 465 U.S. at 617 n.17, strongly suggests that the Court understood that the government would not be barred from using those contents in the investigation and prosecution of the case. Otherwise, the Court's extended discussion of why the contents of voluntarily prepared records are not privileged would have been largely beside the point.

C. The Contents Of Subpoenaed Documents Are Not Tainted Fruits Of The Act Of Production

1. The result in *Doe I* indicates that a grant of use immunity under 18 U.S.C. 6002 and 6003 enables the government to obtain and use the contents of potentially incriminating documents, while protecting a subpoena recipient against self-incrimination by any admissions that might be implicit in the act of production. Nothing in the *Doe I* opinion suggests that the contents of the documents might remain off limits as automatically tainted fruit of the testimonial aspects of the act of production. The court of appeals in this case nevertheless held that subpoenaed documents must themselves be treated as the tainted fruits of the act of production if the Independent Counsel cannot prove a "reasonably particular knowledge of [the] subpoenaed documents' actual existence, let alone their possession by the subpoenaed party," at the time the subpoena was issued. Pet. App. 71a. The court of appeals' holding would largely eliminate the practical utility of the use immunity statute in the act-of-production context. That is because the "reasonable particularity" standard that the court of appeals applied to the derivative use inquiry is indistinguishable from the standard the court fashioned for

addressing the antecedent question whether respondent's act of production had a significant testimonial component protected under the Fifth Amendment.[6] The court's holding thus virtually reduces to the proposition that whenever act-of-production immunity is needed, an order granting it will automatically make the contents of the subpoenaed documents tainted fruit.

Such a holding replicates, when act-of-production immunity is granted, the regime that existed under *Boyd* itself. Under *Boyd*, the use of incriminating documents that an individual was compelled to produce violated the Fifth Amendment, because the producing individual was regarded as in effect testifying through the contents of his private papers. In *Fisher* and *Doe I*, the Court rejected that proposition and held that the contents of voluntarily recorded documents are not themselves protected by the Fifth Amendment when requested by a subpoena. But the expansive concept of derivative use immunity adopted by the court of appeals in this case would (via a different route) put the government in essentially the same place that it occupied under *Boyd*: unable to use even the *contents* of voluntarily prepared records that it obtains under a grant of immunity.

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[6] In the court of appeals' view, the question "whether [respondent's] act of production had sufficient testimonial value to invoke the Fifth Amendment's protections," Pet. App. 61a, is to be resolved by asking whether the Independent Counsel can "demonstrat[e] with reasonable particularity a prior awareness that the exhaustive litany of documents sought in the subpoena existed and were in [respondent's] possession," *id.* at 62a. In addressing the effect of use immunity under Section 6002, the court stated that "[i]f the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence, let alone their possession by the subpoenaed party, and cannot prove knowledge of their existence through any independent means, *Kastigar* forbids the derivative use of the information contained therein against the immunized party." *Id.* at 71a.

Quite apart from its inconsistency with the thrust of the Court's cases culminating in *Doe I*, logic does not support the proposition that documents produced under act-of-production immunity should be regarded as information indirectly derived from the testimonial aspects of the act of production. "The prohibition of derivative use is an implementation of the 'link in the chain of evidence' theory for invocation of the [Fifth Amendment] privilege, pursuant to which the 'compelled testimony' need not itself be incriminating if it would lead to the discovery of incriminating evidence." *Doe II*, 487 U.S. at 208 n.6; see also *Kastigar*, 406 U.S. at 460-461. The delivery to the government of preexisting documents, however, is at its core a physical process by which the government acquires dominion and control over existing physical evidence. Put another way, a subpoena compels a physical process (delivery of documents) as well as implicit testimonial acts, and the requirement imposed through enforcement of the subpoena that the recipient undertake that physical process has a nontestimonial character that is not subject to the Fifth Amendment privilege. See pp. 13-16, *supra*. The government's possession of the documents is a fruit of that physical act, not of the implicit testimonial aspects of the act of production.

A grant of use immunity will, we recognize, preclude the government from using information derived from the testimonial and incriminating aspects of the act of production. The meaning of a document that, on its face, is indecipherable may be clarified by a subpoena recipient's implicit representation that it falls within a particular category of the subpoena. Or, the mere fact that a witness possesses a document may suggest that the witness had knowledge of its contents, and may therefore serve as an "investigatory lead." *Kastigar*, 406 U.S. at 460. In those examples, the government may be unable to make use of the document because it cannot divorce the document's contents from the information conveyed by the act of production. But the

constraints that exist in those situations follow from the government's need to make use of the testimonial aspects of the act of production *in addition to* the contents of the records in investigating the case. When there is no need to make use of those testimonial aspects, there is no barrier to the government's use of the non-testimonial aspects of the act of production, *i.e.*, the documents themselves and their contents.

This Court in *Muniz* recognized that a compelled communicative act may have testimonial and non-testimonial components, and that the Fifth Amendment forbids only the use of the act's testimonial aspects. The defendant in *Muniz* was arrested for drunken driving, transported to the station house, and asked a series of questions. 496 U.S. at 585-586. He was not advised that he had the right to remain silent. *Ibid.* The questioning was videotaped, and both the video and audio portions of the tape were introduced into evidence at Muniz's trial. *Id.* at 587.

While treating Muniz's answers as the product of "compulsion," the Court held that the videotape was admissible to demonstrate the slurred nature of Muniz's speech at the time of his arrest. 496 U.S. at 590. The Court explained:

> Under *Schmerber* and its progeny, * * * any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to [the officer's] direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, see *Dionisio*, *supra*, does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.

Id. at 592. The Court held, however, that the Fifth Amendment barred the admission into evidence of one of Muniz's responses—his statement that he did not know the date of

his sixth birthday (see *id.* at 586)—because that answer "was incriminating, not just because of his delivery, but also because of his answer's *content*." *Id.* at 592.

Muniz makes clear that when an individual's conduct includes both testimonial and nontestimonial components, Fifth Amendment analysis requires precise identification of the aspect of that conduct that has been exploited by the government. In the present case, the court of appeals appears to have reasoned that if (a) a subpoena recipient's act of production has a significant testimonial component, and (b) the government acquires the relevant documents as a result of respondent's act of production, then (c) the documents themselves must be the fruit of compelled testimony. That conclusion simply does not follow. Even assuming the truth of propositions (a) and (b), the government acquires the documents through the purely physical— *i.e.*, non-testimonial—aspect of the recipient's act of production.[7]

2. In an article written before his appointment to the bench, Judge Samuel A. Alito, Jr., proposed an analytic model to resolve claims of Fifth Amendment act-of-production privilege in cases where documents have been obtained by subpoena after a grant of immunity under Sections 6002 and 6003. Under Judge Alito's approach, the

[7] In *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973), the Court held that a suspect in a criminal case had no Fifth Amendment right to refuse to provide a voice exemplar. The Court explained that "[t]he voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said." *Id.* at 7. If a witness was compelled to answer substantive questions pursuant to a grant of use immunity under 18 U.S.C. 6002 and 6003, and his responses to the questions were tape-recorded, the Fifth Amendment surely would not preclude the use of the tape as a voice exemplar—*i.e.*, for its purely nontestimonial component. See *Doe I*, 465 U.S. at 617 n.17 ("To satisfy the requirements of the Fifth Amendment, a grant of immunity need only be as broad as the privilege against self-incrimination.").

grant of use immunity should place the government in the same position that it would occupy if the documents had "materializ[ed] in the grand jury room as if by magic before a subpoena has been issued"—*i.e.*, the position it would occupy if the government "ha[d] the records but [had] no idea where they came from and no information about the meaning of the records except what could be learned from the records themselves." Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 60 (1986). Judge Alito explained that "[t]his image is helpful because it allows us to separate the contents of the records from any evidence, direct or circumstantial, concerning their production." *Ibid.* That analysis is correct. Accord Pet. App. 111a (Williams, J., dissenting).

When the recipient of a subpoena provides documents pursuant to a grant of immunity under 18 U.S.C. 6002 and 6003, the use immunity conferred by Section 6002 covers only such *testimony* as is compelled by the subpoena, and information derived from that testimony. Insofar as a subpoena has the practical effect of requiring its recipient to communicate knowledge or mental impressions (*e.g.*, his prior possession of the document, or his belief that a document falls within a category described in the subpoena) that have not previously been reduced to writing, those communications should presumptively be regarded as compelled testimony.[8] Use immunity therefore precludes the government from drawing any inferences from the act of production that are not apparent from inspection of the documents. But

[8] If the government can establish that the substance of such implicit communications is a "foregone conclusion," then the implicit communications would not "rise[] to the level of testimony within the protection of the Fifth Amendment." *Fisher*, 425 U.S. at 411. We discuss, pp. 28-30, *infra*, why, under the approach of *Fisher*, implied admission of existence and possession of the nature of documents requested in this case should be seen as lacking sufficient testimonial value to acquire Fifth Amendment protection.

because the documents themselves were voluntarily created before the subpoena was issued, their acquisition and subsequent use by the government does not, in and of itself, involve or draw upon any form of compelled testimony.

The court of appeals believed that "the testimonial value of document production is high" in any case where "the government did not have a reasonably particular knowledge of subpoenaed documents' actual existence, let alone their possession by the subpoenaed party," at the time the subpoena was issued. Pet. App. 70a-71a. That analysis misconceives the distinction between the testimonial and nontestimonial aspects of an act of production. Surrender of pre-existing physical evidence is not, in and of itself, a testimonial act, no matter how greatly the evidence contributes to the government's store of knowledge.[9] Rather, the testimonial significance of an act of production of documents depends upon the extent to which that act implicitly communicates mental impressions that have not previously been reduced to writing. Requiring the government to treat sub-

[9] In *Bouknight*, for example, the Court considered the propriety of a court order directing a mother to produce her child for inspection by juvenile authorities. The court that issued the order plainly contemplated that compliance would increase the government's store of knowledge: the basis for the order was that substantial uncertainty existed regarding the child's condition. See 493 U.S. at 552-553. This Court nevertheless stated categorically that "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded. * * * Bouknight therefore cannot claim the privilege based upon anything that examination of [the child] might reveal." *Id.* at 555. The "existence" of the child was not in issue in *Bouknight*, *ibid.*, and the Court did reserve judgment on the question whether "limitations * * * may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings." *Id.* at 561. But the Court clearly envisioned that the child himself, and his physical condition, would not be swept in by possible limitations on the use of the mother's "implicit communication of control over [the child] at the moment of production." *Id.* at 555.

poenaed documents as though they had been acquired "unsolicited and unmarked," *id.* at 111a (Williams, J., dissenting), is therefore an appropriate means of ensuring that a subpoena recipient is not incriminated by the testimonial aspect of his compelled act of production.

3. The court of appeals found that subpoenaed documents are the tainted fruit of a subpoena recipient's admission, implicit in the act of production, that the documents he produced existed. See, *e.g.*, Pet. App. 56a-57a n.33 ("Where the government had no information as to [a document's] potential existence prior to the compelled response, its *a posteriori* knowledge is inextricably linked with the communicative testimony inherent in the subpoena response."). As the preceding analysis indicates, that conclusion is wrong for two related reasons.

a. This Court has recognized that "[c]ompliance with [a] subpoena tacitly concedes *the existence of the papers demanded*." *Fisher*, 425 U.S. at 410 (emphasis added).[10] As the dissenting judge in the court of appeals explained (Pet. App. 105a), the underscored language refers to the subpoena recipient's implicit admission that there exist documents responsive to the subpoena. Indeed, it is difficult to understand how a subpoena recipient could assert that "documents exist" apart from an implicit comment that the documents in question are responsive to the subpoena. Subpoenas do not require production of "documents" in the abstract, but designate documents by description or categories. The only meaningful statement of "existence" that can be inferred from the act of production is that *responsive* documents exist, and only that representation "has communicative

[10] The Court in *Doe I* similarly observed that "[r]espondent did not concede in the District Court that the records listed in the subpoena actually existed or were in his possession. Respondent argued that by producing the records, he would tacitly admit their existence and his possession." 465 U.S. at 614 n.13.

aspects of its own, *wholly aside from the contents of the papers produced.*" *Fisher*, 425 U.S. at 410 (emphasis added).

That a document falls within a category described in the subpoena will not always be discernible from examination of the document's contents. The implicit statement that "responsive documents exist" may therefore convey information "aside from the contents of the papers produced," *i.e.*, in elucidating that a particular document is related to a transaction identified in a category of the subpoena. See Pet. App. 105a (Williams, J., dissenting). And because that information has not voluntarily been committed to writing, its compelled disclosure is a matter of Fifth Amendment concern. By contrast, no information distinct from the documents' contents is communicated by the statement that "the produced documents exist."

b. Even if the statement that "the produced documents exist" were a meaningful testimonial component of the act of production, the government's possession of the contents of the documents is not "derived from" (18 U.S.C. 6002) that testimonial admission. It is instead the result of the act of production *qua* physical act. Because that physical act is "a legitimate independent source[]" (*Kastigar*, 406 U.S. at 462) of the information contained within the documents, respondent's immunity under Section 6002 does not preclude the government from using the documents' contents for investigative and evidentiary purposes, so long as it can do so without resorting to the testimonial and incriminating aspects of the act of production to interpret the contents or to furnish an investigatory lead.

D. The Existence Of Ordinary Business And Financial Records Is Generally A Foregone Conclusion

Even if the court of appeals were correct in holding that a subpoena recipient's act of producing documents is testimonial insofar it reveals the existence of documents, the court erred in requiring the government to demonstrate

prior knowledge of *particular* business and financial records. In *Fisher*, this Court found it "doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment." 425 U.S. at 411. The Court observed that the documents sought—accountant's workpapers—were "the kind usually prepared by an accountant working on the tax returns of his client." *Ibid.* It concluded that

> [t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender."

Ibid. (quoting *In re Harris*, 221 U.S. 274, 279 (1911)).

In finding that the "existence and location" of the subpoenaed documents were a "foregone conclusion," the Court in *Fisher* did not require the government to establish its knowledge of the individual documents sought by the subpoena. Nor, contrary to the court of appeals' conclusion (see Pet. App. 33a-34a), did it find that the government "had highly specific knowledge as to the existence" of the subpoenaed documents. The Court relied instead on the general nature of the subpoenaed documents, noting that they were "the kind usually prepared by an accountant working on the tax returns of his client." 425 U.S. at 411.

Thus, *Fisher*'s "foregone conclusion" test focuses on broader categories of documents, and not on the individual documents that may fall within the specifications of a subpoena. As applied to an individual who is or was engaged in business, the test would therefore defeat any effort to invoke the Fifth Amendment to resist compliance with a subpoena for ordinary business records, such as ledgers,

bank records, invoices, receipts, and bills.[11] Such documents are kept by every business, and conceding their existence therefore "adds little or nothing to the sum total of the Government's information." *Fisher*, 425 U.S. at 411.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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[11] See Sara S. Beale, William C. Bryson, et al., *Grand Jury Law and Practice* § 6:15, at 6-113 (2d ed. 1997) ("a subpoena for a sole proprietor's bank account records could hardly raise serious questions about the existence of the records and the sole proprietor's possession of them"); see also *United States* v. *Stone*, 976 F.2d 909, 911 (4th Cir. 1992) (foregone conclusion that witness would possess rental documents and utility and telephone bills for beach house), cert. denied, 507 U.S. 1029 (1993); *United States* v. *Fishman*, 726 F.2d 125, 127 & n.4 (4th Cir. 1983) (doctor's possession and control of business records is a "self-evident truth[]"). This Court in *Doe I* did affirm the finding of the court of appeals in that case that a subpoena calling for business records generally like the sort of financial and business records sought in this case triggered a protected act of production, and that the government had not satisfied the "foregone conclusion" test. *Doe I*, 465 U.S. at 614 n.13. The Court, however, relied primarily on its reluctance "to disturb findings of fact in which two courts below have concurred," *id.* at 614, and did not independently examine the question. *Doe I* therefore should not be read to retreat from the analysis of *Fisher*.

APPENDIX

18 U.S.C. 6002 provides as follows:

Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. 6003 provides as follows:

Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or

may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.



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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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18pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES....ii

INTEREST OF *AMICUS CURIAE*....1

SUMMARY OF THE ARGUMENT....1

ARGUMENT....3

THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION PRECLUDES THE GOVERNMENT FROM OF DOCUMENTS THAT ARE PROVIDED BY AN INDIVIDUAL UNDER A GRANT IMMUNITY....3

A. THE CLEAR LANGUAGE OF 18 U.S.C. §§ 6002 AND 6003 PRECLUDES COMPELLED INFORMATION FROM BEING USED AGAINST AN INDIVIDUAL PROVIDED WITH IMMUNITY PURSUANT TO THESE STATUTES....3

B. INFORMATION THAT IS DERIVATIVE OF THE IMMUNIZED ACT OF PRODUCTION CANNOT BE USED TO INCRIMINATE THE INDIVIDUAL PROVIDING THE INFORMATION....7

C. THE FIFTH AMENDMENT PROTECTS AN INDIVIDUAL'S PRODUCTION OF DOCUMENTS FROM BEING USED AGAINST HIM OR HER....10

CONCLUSION....13

TABLE OF AUTHORITIES

CASES **Pages**

Braswell v. United States, 487 U.S. 99 (1988).....11

Fisher v. United States, 425 U.S. 391 (1976).....5, 8, 12

Gilbert v. California, 388 U.S. 263 (1967).....12

Hoffman v. United States, 341 U.S. 479 (1950).....7

In re Grand Jury Subpoena Duces Tecum, Dated Oct. 29, 1992, 1 F.3d 87 (2nd Cir. 1993).....9

Kastigar v. United States, 406 U.S. 441(1972).....5, 6, 8, 9

McNally v. United States, 483 U.S. 350 (1987).....4

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964).....10, 11

Schmerber v. California, 384 U.S. 757 (1966).....12

United States v. Albertini, 472 U.S. 675 (1985).....4

United States v. Doe (Doe I), 465 U.S. 605 (1984).....5, 11, 12

United States v. Hubbell, 167 F.3d 552 (D.C. Cir. 1999).....2, 6, 9

United States v. J.W.O., 940 F.2d 1165 (8th Cir. 1991).....5

CONSTITUTION, STATUTES, AND RULES

Pages

U.S. Const., amend. V.....*passim*, 1, 2, 3, 4, 5, 8, 9, 10, 11, 12

18 U.S.C. § 6001.....1, 4, 6, 12

18 U.S.C. § 6002.....*passim*, 1, 3, 4, 6, 12

18 U.S.C. § 6003.....*passim*, 1, 3, 5, 12

Organized Crime Control Act of 1970, Part II.....4, 7

S.Ct. Rule 37.6.....1

MISCELLANEOUS

Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 91st Cong., 1st Sess., H.R. 11157 and H.R. 12041 (Testimony of Professor Dixon).....4

Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives, S. 30, 91st Cong. 2nd Sess., May 21, 1970 (Comments of Department of Justice on S.30 Organized Crime Control Act of 1969: Statement of Attorney General).....7

Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 91st Cong., 1st Sess., H.R. 11157 and H.R. 12041 (Statement of Will Wilson, Assistant Attorney General, Criminal Division, Department of Justice).....4

Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives, S. 30, 91st Cong. 2nd Sess.,

May 21, 1970 (Comments of Department of Justice on S.30 Organized Crime Control Act of 1969).....4

Peter J. Henning, *Finding What Was Lost: Sorting the Custodian's Privilege Against Self-Incrimination from the Compelled Production of Records*, 77 Neb. L. Rev. 34 (1998).....11

Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, 3 *Criminal Procedure 2nd* § 8.13 (1999).....9

Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law 2nd* § 1.8(1986).....6

Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1 (1987).....9

Richard A. Nagareda, *Compulsion "To Be A Witness" And The Resurrection Of Boyd*, (to be published in 74 N.Y.U. L. Rev. 1575, 1621 (1999)).....11

National Commission on Reform of Federal Criminal Law, Nov. 18, 1968 (Testimony of Professor Dixon).....7

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution. One of its particular concerns is ensuring that all individuals, including the criminally accused and suspected, be ensured of the constitutional rights embodied in the Fifth Amendment clause that "No person ....shall be compelled in any criminal case to be a witness against himself."

SUMMARY OF ARGUMENT

The immunity statutes, 18 U.S.C. §§ 6001-6003, clearly provide use and derivative use immunity for both testimony and documents. When a witness is subpoenaed, refuses to provide documents pursuant to a proper assertion of the Fifth Amendment, and thereafter receives immunity pursuant to 18 U.S.C. § 6003, the

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

government cannot use that testimonial communication against the witness. Requiring a witness to turn over voluminous "personal and financial"[2] records (in this case "some 13,120 pages of documents and records") and then have those documents used as the basis for instituting a prosecution against the witness violates the unambiguous language of the immunity statute in addition to the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment right against self-incrimination is crucial to preserving our adversarial process. It serves to safeguard against government abuse. The values embodied in the Fifth Amendment are jeopardized when the Government can use documents produced by a witness, pursuant to use/derivative use immunity, as the basis for a prosecution against this same witness. Permitting the Government to commence an investigation by requiring an individual to produce his or her documents improperly shifts the burden of producing evidence of guilt onto the accused.

If the Government has knowledge of the existence of these documents prior to issuing the subpoena and also has a basis, other than through the witness, for introducing them at trial, it should not be permitted to use the witness/defendant to obtain the documents. It is unnecessary to offer the witness immunity when there is another source from which to procure the documents. Alternatively, if the Government has no knowledge of the existence of these documents, then the production of the documents accruing from the witness' testimony represents a derivative use of the grant of immunity. If the Government has no knowledge of the existence of the specific documents then the documents should not be considered a foregone conclusion.

Entity documents and individuals producing documents as the custodian of a collective entity offer different concerns than an *individual* being asked to produce documents that will be used against the *individual*. Further a non-communicative taking by the

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[2] *United States v. Hubbell*, 167 F.3d 552, 563 (D.C. Cir. 1999).

Government, as one finds in cases where the government extracts an individual's blood or requires a handwriting exemplar, does not address the witness being given a grant of statutory immunity to procure testimony or information that serves as the basis for his or her indictment.

ARGUMENT

THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION PRECLUDES THE GOVERNMENT FROM USING DOCUMENTS THAT ARE PROVIDED BY AN INDIVIDUAL UNDER A GRANT OF IMMUNITY

A. THE CLEAR LANGUAGE OF 18 U.S.C. §§ 6002 AND 6003 PRECLUDES COMPELLED INFORMATION FROM BEING USED AGAINST AN INDIVIDUAL PROVIDED WITH IMMUNITY PURSUANT TO THESE STATUTES

In determining the scope of immunity, there is no legal justification to distinguish between that which is written and that which is spoken. Clearly the statute includes both. Immunity provided pursuant to 18 U.S.C. § 6002 specifically requires that

> no testimony *or other information* compelled under the order (or any information directly or *indirectly* derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Id. (emphasis added) By requesting that a court grant a witness immunity, federal prosecutors receive the benefit of a compelled communication in return for the guarantee that they will not use the information directly or indirectly in a later prosecution of the

individual providing the information.

"Courts in applying criminal law generally must follow the plain and unambiguous meaning of the statutory language." *United States v. Albertini*, 472 U.S. 675, 680 (1985). The clear language of 18 U.S.C. § 6002 includes the protection of "testimony *or* other information." The use of the disjunctive "or" emphasizes the clear congressional purpose to provide immunity for both testimony and information. (*See McNally v. United States*, 483 U.S. 350, 365 (1987)) (Stevens, J., joined by O'Connor, J., dissenting) (use of disjunctive "or" in mail fraud statute provides clear language). "Other information," as defined in 18 U.S.C. § 6001 "includes any book, paper, *document*, record, recording, or other material." (emphasis added). Immunity is not limited to oral testimony.

The present immunity statute was included as Part II of the Organized Crime Control Act of 1970. Its passage offered a unitary approach to immunity from what had been "a hodgepodge of existing immunity provisions tied to particular substantive statutes..."[3] Immunity affords prosecutors a bargaining tool to procure information necessary for prosecution that normally would be inaccessible because of the Fifth Amendment. "It is simply a fixed price that the Government must pay to obtain certain kinds of information..."[4]

Many of the self-incrimination cases, such as *Fisher v. United*

[3] Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 91st Cong., 1st Sess., H.R. 11157 and H.R. 12041, at p. 40 (Statement of Will Wilson, Assistant Attorney General, Criminal Division, Department of Justice). The provisions of Part II are similar to H.R. 11157. See Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives, S. 30, 91st Cong. 2nd Sess., at p. 160, May 21, 1970 (Comments of Department of Justice on S.30 Organized Crime Control Act of 1969).

[4] Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 91st Cong., 1st Sess., H.R. 11157 and H.R. 12041, at p. 69 (Testimony of Professor Dixon).

States, 425 U.S. 391 (1976) and *United States v. Doe (Doe I)*, 465 U.S. 605 (1984), considered testimonial compulsion absent a grant of immunity.[5] In contrast, in *Kastigar v. United States*, 406 U.S. 441, 453 (1972), where immunity was provided, this Court recognized the importance of a grant of immunity, stating that it "prohibits the prosecutorial authorities from using the compelled testimony *in any respect*, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." (emphasis added).

There is no fear of this statute providing "immunity baths," such as an all-encompassing immunity to a witness for crimes not known to prosecutors. The statute does not offer transactional immunity and is limited to what is requested by the prosecutor. Thus, if a prosecutor desired documents that he or she intends to use against the witness producing them, he or she should secure the documents from another source.[6] The Government's inability to obtain the documents from someone other than the witness may implicate the Fifth Amendment's privilege against self-incrimination. As noted by this Court in *Doe I*, 465 U.S. at 616, "[t]he decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation."

Although some Court decisions may be seen to have moved away from providing full Fifth Amendment protection to documents produced via subpoena, the statute authorizing a court to compel the production of documents (18 U.S.C. § 6003) and to grant immunity

[5] The District Court's order states in part: "2. That Webster L. Hubbell is granted immunity to the extent allowed by law. *See United States v. Doe*, 465 U.S. 605 (1984) and *United States v. J.W.O.*, 940 F.2d 1165 (8th Cir. 1991)." (Jt. App., at 61).

[6] The prosecutor also has the option of obtaining these documents through an authorized search.

(18 U.S.C. § 6002) have remained intact.[7] When the Government elects to secure documents directly from a witness and to request that the court issue a grant of immunity, the clear language of the statute provides that the documents and any information derived therefrom cannot be used against the party provided with immunity. Since the documents do not arrive in the grand jury room "like manna from heaven,"[8] it is appropriate to provide the immunized individual presenting them to the grand jury with the full protection afforded by the immunity statute.

It is the prosecution and not the accused that has the burden of proving a defendant's guilt in a criminal case. The Government's burden of proof includes "[t]he burden of producing evidence." Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law 2nd* § 1.8, at p. 48 (1986). Having the accused give the very evidence that will be presented at trial improperly shifts the burden onto the defense. Limiting the immunity statute to only provide the Government with a benefit, an order compelling the production of the documents, with no corresponding benefit to the person providing the documents, permits the Government to use the accused to produce the very evidence that will serve as the basis of the Government's case against that individual.

To permit the Government to use the witness's *documents* would render meaningless the explicit word used in § 6001. The effect of such a reading would give prosecutors the option of commencing their cases by securing all documentation directly from the accused. With technological advancements this could result in the government securing massive amounts of information from a potential defendant's computer files and hard drives. Unlike a search, there would be no requirement of probable cause and no protection for the

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[7] *See United States v. Kastigar*, 406 U.S. 441, 462 (1972) ("The immunity therefore is coextensive with the privilege and suffices to supplant it.").

[8] *United States v. Hubbell*, 167 F.3d 552, 585, 602 (1999).

individual targeted by a prosecutor. In white collar cases that are predominantly documentary, immunity will be a nullity.

B. INFORMATION THAT IS DERIVATIVE OF THE IMMUNIZED ACT OF PRODUCTION CANNOT BE USED TO INCRIMINATE THE INDIVIDUAL PROVIDING THE INFORMATION

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.

Hoffman v. United States, 341 U.S. 479, 486 (1950). Although an immunized witness can still be prosecuted, the prosecution cannot use the immunized testimony directly or indirectly. Immunity permits prosecution only with "untainted evidence."[9] As the Government has long acknowledged, "[t]he practical difficulty of establishing that intended evidence is independently derived and not the fruit of compelled testimony will occasionally deter legally permissible presentations."[10]

The burden rests with the government to prove that "their evidence is not tainted by establishing that they had an independent,

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[9] National Commission on Reform of Federal Criminal Law, at p. 1405, Nov. 18, 1968 (Testimony of Professor Dixon). The proposed immunity reforms of the National Commission on Reform of Federal Criminal Laws served as the draft for the S. 30, Title II, Organized Crime Control Act of 1970.

[10] *See* Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives, S. 30, 91st Cong. 2nd Sess., at p. 161, May 21, 1970 (Comments of Department of Justice on S.30 Organized Crime Control Act of 1969: Statement of Attorney General).

legitimate source for the disputed evidence." *Kastigar*, 406 U.S. at 460. Absent a hearing to determine the Government's independent knowledge, the Government's burden is not met. This is especially true when the finder of fact specifically determines that the evidence that would be used at trial was directly or indirectly derived from the documents produced by the witness/defendant pursuant to a grant of immunity.[11]

The Fifth Amendment right against self-incrimination clearly applies "when the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher*, 425 U.S. at 408. Three communicative acts are involved in Mr. Hubbell's production of his documents. These are revealing the existence of the documents, establishing the witness's possession and control, and authentication of the documents.[12] In a case where immunity is granted, it is an improper derivative use for the prosecution "[a]rmed with that information and the documents produced," to use this information to "locate persons who either observed the individual preparing the documents or prepared them themselves under this supervision and are

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[11] *See* App. to Pet. for a Writ of Cert., at p. 130a. ("The independent counsel has indicted that a *Kastigar* hearing is unnecessary because he 'will make no bones about the fact that [he] did use the information provided by Mr. Hubbell pursuant to the production immunity.' Tr. Of Status Conf., June 2, 1998, at 8. He argues that the instant motion 'will rise and fall on the law.' *Id.*").

[12] Mr. Hubbell's production of documents was accompanied by an act of production. The act in this case involved testimony. Specific questions were asked of Mr. Hubbell at the time he produced these documents. Jt. Appendix p. 62-70. Some of the questions specifically asked of Mr. Hubbell were if he brought the requested documents (p. 62, 64), if he provided all the documents (p. 65, 66, 67, 68, 68), whether he understood everything that was being asked for (p. 69), whether he understood constructive possession (p. 67), whether he understood that he was required to produce documents within his constructive possession (p. 67), whether he withheld any documents premised on a privilege other then the attorney work product privilege (p. 70), and whether he had searched or "caused a thorough search to be made in response to this Subpoena." (p. 69). The receipt of the documents was derivative of this testimony.

thus able to authenticate them." Robert P. Mosteller, *Simplifying Subpoena Law:Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1 (1987). Although prosecutors can avoid derivative use issues by showing an independent basis for their evidence, it is incumbent that the Government meet this burden. "[T]he requirement that the prosecution introduce independent proof to eliminate the possibility of improper use seems a modest price to pay for the protection of a witness' fifth amendment rights." *Id.* at 42.

The foregone conclusion test is often used by courts to determine whether there is compelled testimony. If the items produced "add[] little or nothing to the sum total of the Government's information" the question has been held to be one of surrender and not testimony. *Fisher*, 425 U.S. at 411. Recent lower court rulings generally require "that the foregone conclusion standard be met by the government 'demonstrat[ing] with reasonable particularity that it knows of the existence and location of subpoenaed documents.'" Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, 3 *Criminal Procedure 2nd* § 8.13, at 262-63 (1999) (*quoting In re Grand Jury Subpoena Duces Tecum, Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2nd Cir. 1993). One cannot use the existence of mere categories of documents as a basis for contending the documents are a foregone conclusion if the Government does not know of the existence of the specific documents prior to the accused producing them.[13]

If the existence, possession, and authentication of the documents are a foregone conclusion, there is no implication to the Fifth Amendment and thus no necessity to provide immunity to the witness. *See Mosteller*, *supra*, at 48. If the government can establish the existence and location of the documents other then by using the defendant's testimonial act of production, there would be no need to use the defendant to produce them before the grand jury. Here again, the Fifth Amendment would not be violated and there would be no need to grant immunity to the witness. It degrades the very essence of

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[13] *See United States v. Hubbell* 167 F.3d 552, 581n. 36 (D.C. Cir. 1999).

this constitutional privilege to claim that it is more efficient to procure items from an accused through a grant of immunity than to obtain the items from other available sources.

If the Government does not know of the existence and location of these documents and only acquires that information from the witness who received immunity, then clearly the documents are derivative of the testimony provided by the witness. This violates both the Fifth Amendment and 18 U.S.C. § 6002.

C. THE FIFTH AMENDMENT PROTECTS AN INDIVIDUAL'S PRODUCTION OF DOCUMENTS FROM BEING USED AGAINST HIM OR HER

The Fifth Amendment provides that "No person ....shall be compelled in any criminal case to be a witness against himself." In *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964), this Court stated that "[t]he privilege against self-incrimination 'registers an important advance in the development of our liberty –'one of the greatest landmarks in man's struggle to make himself civilized." In *Murphy*, Justice Goldberg discussed the "fundamental values" that are advanced by the Fifth Amendment Privilege. These policies are not exclusive to oral testimony. Rather, they serve an equally important function in the context of compelled production of documents.

An individual producing papers can be subjected "to the cruel trilemma of self-accusation, perjury or contempt." *Id.* A compelled production of an individual's documents moves us further from "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Id.* Without Fifth Amendment protection, one forced to produce documents may be compelled to provide incriminating communication "elicited by inhumane treatment and abuses."*Id.* Forcing a witness, to produce documents that will be used against him or her, is in direct opposition to "our sense of fair play which dictates 'a fair state-individual balance requiring the government to leave the

individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." *Id.* Requiring an individual to produce "some 13,120 pages" of his or her documents and records does not advance a value of "respect for the inviolablity of the human personality."*Id.* Finally, it must also be remembered that while the privilege is "sometimes 'a shelter to the guilty' [it] is often 'a protection to the innocent." *Id.*

These values inherent in the Fifth Amendment right against self-incrimination are not implicated when the documents involve an entity, or an individual acting in a representative capacity to the entity. It is therefore warranted to differentiate between entities and individuals. *See* Peter J. Henning, *Finding What Was Lost: Sorting the Custodian's Privilege Against Self-Incrimination from the Compelled Production of Records*, 77 Neb. L. Rev. 34, 35 (1998). In *Braswell v. United States*, 487 U.S. 99, 117 (1988), this Court noted that requiring a grant of immunity to produce corporate records could have "serious consequences" should the government decide to prosecute the custodian.

Individuals and sole proprietors, however, clearly have a Fifth Amendment right when they are subpoenaed to produce records. *Id.* at 104-05. Absent a statutory grant of immunity, individuals cannot be compelled to produce business or personal records. *Doe I*, 465 at 617. The policy considerations inherent in the Fifth Amendment support this distinction.

The Fifth Amendment right against self-incrimination protects that which is *given* by an individual as opposed to that which is *taken* by the government. *See* Richard A. Nagareda, *Compulsion "To Be A Witness" And The Resurrection Of Boyd*, (to be published in 74 N.Y.U. L. Rev. 1575, 1621 (1999)). Professor Nagareda provides an extensive review of the historical context of the Fifth Amendment phrase "to be a witness," from state constitutions existing at the time of its ratification, a lone discussion when the First Congress debated the proposed Bill of Rights, and definitions of terminology used during this period. All provide strong evidence that this phrase "spoke in

terms of a right against compulsion either 'to give evidence' or, equivalently, 'to furnish evidence.'" *Id.* at 1605-09. "[T]he compelled giving of evidence (forbidden by the Fifth Amendment)" differs from "the taking thereof (regulated by the Fourth)." *Id.* at 1621. Thus, the Fifth Amendment privilege is inapplicable when the government takes evidence such as blood samples, *Schmerber v. California*, 384 U.S. 757 (1966).

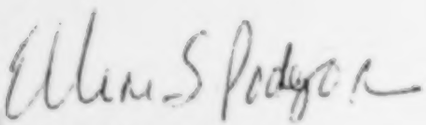
It is also apparent that while a compelled production may be present in cases such as *Schmerber* and *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplars), there is no accompanying testimonial communication that is incriminating. *Fisher*, 425 U.S. at 408. Thus, there is no need to provide immunity. Requiring an individual to provide his or her private documents to the government that are later used as the basis for an indictment against that individual, renders the giving of the papers a testimonial communication that is incriminating. In *Schmerber*, this Court stated that "[i]t is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." 384 U.S. at 763-64.

The Fifth Amendment right against self-incrimination is an important right to maintaining liberty. Finding the Fifth Amendment essentially inapplicable when an individual produces documents pursuant to a grant of use immunity will provide an exorbitant power to prosecutors. Permitting prosecutors authority under 18 U.S.C. §§ 6001-6003 to provide immunity and then use immunized testimony against a witness by claiming the documents are "manna from heaven," takes the act of production and makes that communication irrelevant. This contradicts this Court's holdings in *Fisher* and *Doe I*. It provides the Government with an incentive to immunize all witnesses, including targets. Prosecutors could shortcut investigations by simply making a witness produce the evidence that will serve as that person's indictment.

CONCLUSION

For the foregoing reasons, NACDL urges this Court to affirm the judgment of the Court of Appeals.

Respectfully Submitted,



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